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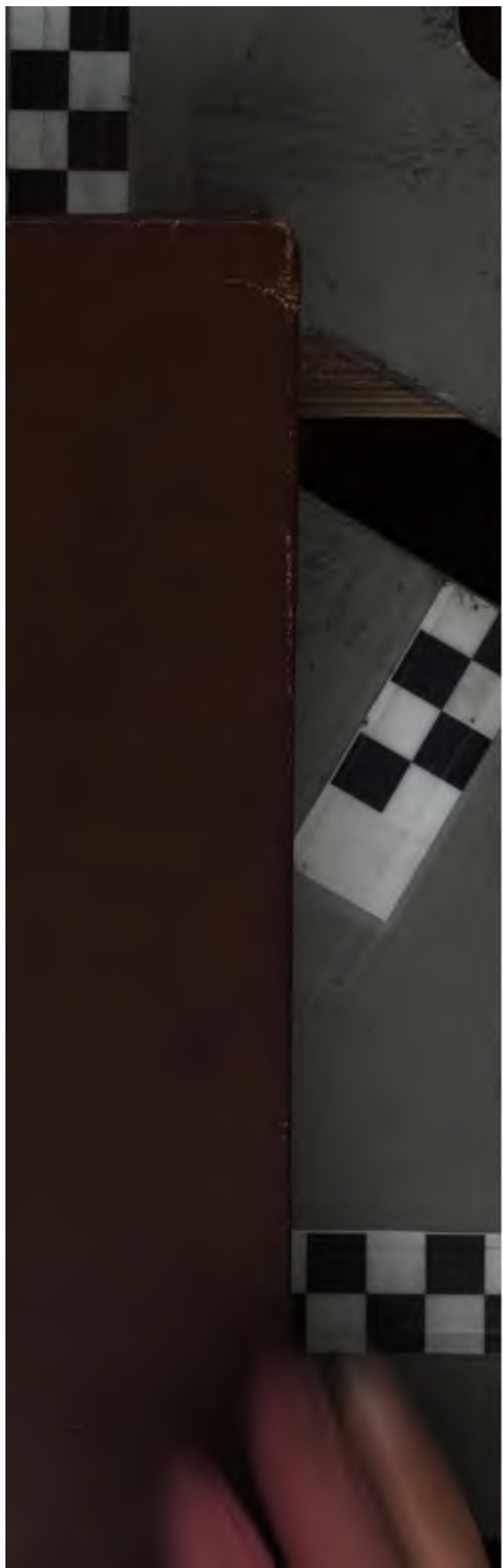
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TO  
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## P R E F A C E.

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THE object of the following work is to reduce into a systematic arrangement the numerous statutes and decisions of the law of England regulating the Formation and the Dissolution of the Contract of Marriage, and relating to the Registration of Births, Deaths, and Marriages. The Remedies for the Violation of Matrimonial Engagements are considered; but the rights of property consequent upon the relation between husband and wife involve questions of too extensive a nature to be included within the limits assigned to this work, except in so far as such rights are connected with the dissolution or the violation of the marriage contract.

It must be admitted, that there exists no branch of law more important in any point of view to the great interests of society, and to the personal comforts of its members, than the subject of this work.

Although the law relating to marriage is for ordinary purposes sufficiently plain and well understood, and but few questions, in comparison with the number of marriages, arise, or require judicial determination; yet it is presumed that a general view of the nature and extent of the materials bearing upon the subject, will make it sufficiently apparent that an attempt to bring them under one point of consideration cannot be deemed a work of supererogation.

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The work also embraces the Law applicable to the Marriages of British Subjects in Foreign Countries, so far as the validity of such marriages depends upon the rules adopted by the English courts of justice.

The Separation of Husband and Wife by their voluntary act, without the interposition of judicial sentence, appeared to be too intimately connected with the subject of the treatise to be properly omitted. This has led to the consideration of Deeds of Separation, and other matters incident to the separation of husband and wife, respecting which questions not unfrequently arise.

The Author is not without hope that the work will be found to contain such matters of general interest and importance, and to possess such accuracy in the deduction of principles and method in the arrangement, as will ensure its favourable reception by the profession and the public.

Those who are best acquainted with the assistance afforded by separate treatises on law, and the labour attendant upon the compilation of an original treatise on any comprehensive subject of English law in its present intricate and voluminous state, will be disposed to treat with candour and indulgence any defects which may be discovered in the execution of a work, even though it possess no merit beyond that of lessening the labour of others, by affording facility of reference to the authorities upon which it is founded.

3, BRICK COURT, TEMPLE, March, 1841.

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A  
PRACTICAL TREATISE  
OF  
The Law of Marriage and Divorce;  
CONTAINING ALSO  
THE MODE OF PROCEEDING ON DIVORCES  
IN THE  
Ecclesiastical Courts and in Parliament;  
THE  
RIGHT TO THE CUSTODY OF CHILDREN;  
VOLUNTARY SEPARATION BETWEEN HUSBAND AND WIFE;  
THE  
HUSBAND'S LIABILITY TO WIFE'S DEBTS;  
AND THE  
CONFLICT BETWEEN THE LAWS OF ENGLAND AND SCOTLAND  
RESPECTING DIVORCE AND LEGITIMACY.

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BY LEONARD SHELFORD, Esq.,  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.



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Faremouth v. Watson	179	Greenhill v. Aitkin	736	Farrel v. Barrie	100	— v. Greenhill	501. 508. 574. 589	Farrer v. Countess of Granard	477. 659	Greenstreet, falsely called Cumyns,		Feanburt v. Turst	148	— v. Cumyns	205	Fendall v. Nash	700	Greenwell v. Greenwell	608	Ferne, Ex parte	193	Greenwood v. Curtis	128	Ferrers's (Lord) case	669	Greg v. Greg	494. 555. 557	— v. Ferrers	416-7. 436. 446. 447	Gregg's case	220	Fettiplace v. Gorges	661	Gregson v. M'Taggart	389	Field v. Serres	421	Grierson v. Grierson	115	Filewood v. Cousins	520	Griffiths v. Anthony	522	Filmer v. Lynn	641. 646	— v. Reed	176. 177	Fitzer v. Fitzer	598. 619. 622	Grignion v. Grignion	468	Fitzgerald v. Fitzgerald	533	Grindell v. Godmund	654	Fitzmaurice (Lord,) case of,	34	Groom v. Thomas	198	Flack v. Holm	122	Grosvenor, Ex parte	424. 675	Fleet v. Holmes	540	Grove v. Elliott	23	Fletcher v. Fletcher	591. 629. 634	Gumbleton, Ex parte	673	— v. Le Breton	564	Guest v. Guest	211	— v. Pynsett	464	— v. Shipley	404	Fluck v. Tollemache	656	Guth v. Guth	626. 629. 631. 633	Foden v. Finney	599. 607	Guy v. Pearkes	599. 606	Foley v. Lord Peterborough	386. 389			Forster v. Cooke	730	H.		— v. Forster	441. 442. 449	Haffey v. Haffey	600	Foubert v. Turst	121	Haines v. Jecott	174. 175	Foulkes v. Foulkes	596	Haley v. Bannister	700	Foxcroft's case	29	— v. Hamilton	978	Fraser v. Fraser	588	Halford v. Halford	415. 516	Freemoult v. Dedire	148	Hall, Ex parte,	111	Fulleck v. Allinson	194	— v. Campbell	73	Fuller's case	464	— v. Maule	466	Fust v. Bowerman	571	Ham v. Toovey	422			Hamerton v. Hamerton	399. 403. 404. 407. 490. 561. 591. 597			Hamilton (the Duchess of) v. the				— Duke of Hamilton	761			Hamley v. Gilbert	697			Hardie v. Grant	640. 647			Hardy v. Ryle	557			Harford v. Morris	63. 111. 130. 134. 145. 148. 187. 214. 480. 486			Harris v. Ball	202			— v. Harris	400. 405. 412. 413. 434. 437. 442. 449. 588. 590. 591			— v. Hicks	178. 484			— v. Lee	642			— v. Morris	420. 422. 438. 449. 451. 599. 647			— v. Tippet	525			Harrison v. Almond	660			— v. Burwell	127. 163. 166. 169. 173. 464. 484			— v. Hall	644			Hart v. Marsh	467. 554			Harvey v. Norton	653			Harwood v. Heffer	438	G.				Gale, In re	503			Gallini v. Gallini	691			Gambier v. Gambier	804			Garner v. Lady Lanesborough	150. 477			Garth v. Earnshaw	635			Gibbs v. Hooper	711			Gilchrist v. Brown	648			Gill v. Gill	562			Gilpin v. Gilpin	454. 457			Goldsmid v. Bromer	67. 68. 69. 564			Goodall v. Whitmore	531			Goodfellow v. Robings	394			Goodhall v. Goodhall	588			Goodright v. Moss	723. 725. 726			Gordon (Duchess of) v. Duke of				— Gordon	736. 737			— v. Englegraaf	760			— v. Pye	736. 737. 740. 744. 747			Gould v. Gapper	465. 466			Govier v. Hancock	422. 647						
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Fendall v. Nash	700	Greenwell v. Greenwell	608	Ferne, Ex parte	193	Greenwood v. Curtis	128	Ferrers's (Lord) case	669	Greg v. Greg	494. 555. 557	— v. Ferrers	416-7. 436. 446. 447	Gregg's case	220	Fettiplace v. Gorges	661	Gregson v. M'Taggart	389	Field v. Serres	421	Grierson v. Grierson	115	Filewood v. Cousins	520	Griffiths v. Anthony	522	Filmer v. Lynn	641. 646	— v. Reed	176. 177	Fitzer v. Fitzer	598. 619. 622	Grignion v. Grignion	468	Fitzgerald v. Fitzgerald	533	Grindell v. Godmund	654	Fitzmaurice (Lord,) case of,	34	Groom v. Thomas	198	Flack v. Holm	122	Grosvenor, Ex parte	424. 675	Fleet v. Holmes	540	Grove v. Elliott	23	Fletcher v. Fletcher	591. 629. 634	Gumbleton, Ex parte	673	— v. Le Breton	564	Guest v. Guest	211	— v. Pynsett	464	— v. Shipley	404	Fluck v. Tollemache	656	Guth v. Guth	626. 629. 631. 633	Foden v. Finney	599. 607	Guy v. Pearkes	599. 606	Foley v. Lord Peterborough	386. 389			Forster v. Cooke	730	H.		— v. Forster	441. 442. 449	Haffey v. Haffey	600	Foubert v. Turst	121	Haines v. Jecott	174. 175	Foulkes v. Foulkes	596	Haley v. Bannister	700	Foxcroft's case	29	— v. Hamilton	978	Fraser v. Fraser	588	Halford v. Halford	415. 516	Freemoult v. Dedire	148	Hall, Ex parte,	111	Fulleck v. Allinson	194	— v. Campbell	73	Fuller's case	464	— v. Maule	466	Fust v. Bowerman	571	Ham v. Toovey	422			Hamerton v. Hamerton	399. 403. 404. 407. 490. 561. 591. 597			Hamilton (the Duchess of) v. the				— Duke of Hamilton	761			Hamley v. Gilbert	697			Hardie v. Grant	640. 647			Hardy v. Ryle	557			Harford v. Morris	63. 111. 130. 134. 145. 148. 187. 214. 480. 486			Harris v. Ball	202			— v. Harris	400. 405. 412. 413. 434. 437. 442. 449. 588. 590. 591			— v. Hicks	178. 484			— v. Lee	642			— v. Morris	420. 422. 438. 449. 451. 599. 647			— v. Tippet	525			Harrison v. Almond	660			— v. Burwell	127. 163. 166. 169. 173. 464. 484			— v. Hall	644			Hart v. Marsh	467. 554			Harvey v. Norton	653			Harwood v. Heffer	438	G.				Gale, In re	503			Gallini v. Gallini	691			Gambier v. Gambier	804			Garner v. Lady Lanesborough	150. 477			Garth v. Earnshaw	635			Gibbs v. Hooper	711			Gilchrist v. Brown	648			Gill v. Gill	562			Gilpin v. Gilpin	454. 457			Goldsmid v. Bromer	67. 68. 69. 564			Goodall v. Whitmore	531			Goodfellow v. Robings	394			Goodhall v. Goodhall	588			Goodright v. Moss	723. 725. 726			Gordon (Duchess of) v. Duke of				— Gordon	736. 737			— v. Englegraaf	760			— v. Pye	736. 737. 740. 744. 747			Gould v. Gapper	465. 466			Govier v. Hancock	422. 647																						
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Fletcher v. Fletcher	591. 629. 634	Gumbleton, Ex parte	673	— v. Le Breton	564	Guest v. Guest	211	— v. Pynsett	464	— v. Shipley	404	Fluck v. Tollemache	656	Guth v. Guth	626. 629. 631. 633	Foden v. Finney	599. 607	Guy v. Pearkes	599. 606	Foley v. Lord Peterborough	386. 389			Forster v. Cooke	730	H.		— v. Forster	441. 442. 449	Haffey v. Haffey	600	Foubert v. Turst	121	Haines v. Jecott	174. 175	Foulkes v. Foulkes	596	Haley v. Bannister	700	Foxcroft's case	29	— v. Hamilton	978	Fraser v. Fraser	588	Halford v. Halford	415. 516	Freemoult v. Dedire	148	Hall, Ex parte,	111	Fulleck v. Allinson	194	— v. Campbell	73	Fuller's case	464	— v. Maule	466	Fust v. Bowerman	571	Ham v. Toovey	422			Hamerton v. Hamerton	399. 403. 404. 407. 490. 561. 591. 597			Hamilton (the Duchess of) v. the				— Duke of Hamilton	761			Hamley v. Gilbert	697			Hardie v. Grant	640. 647			Hardy v. Ryle	557			Harford v. Morris	63. 111. 130. 134. 145. 148. 187. 214. 480. 486			Harris v. Ball	202			— v. Harris	400. 405. 412. 413. 434. 437. 442. 449. 588. 590. 591			— v. Hicks	178. 484			— v. Lee	642			— v. Morris	420. 422. 438. 449. 451. 599. 647			— v. Tippet	525			Harrison v. Almond	660			— v. Burwell	127. 163. 166. 169. 173. 464. 484			— v. Hall	644			Hart v. Marsh	467. 554			Harvey v. Norton	653			Harwood v. Heffer	438	G.				Gale, In re	503			Gallini v. Gallini	691			Gambier v. Gambier	804			Garner v. Lady Lanesborough	150. 477			Garth v. Earnshaw	635			Gibbs v. Hooper	711			Gilchrist v. Brown	648			Gill v. Gill	562			Gilpin v. Gilpin	454. 457			Goldsmid v. Bromer	67. 68. 69. 564			Goodall v. Whitmore	531			Goodfellow v. Robings	394			Goodhall v. Goodhall	588			Goodright v. Moss	723. 725. 726			Gordon (Duchess of) v. Duke of				— Gordon	736. 737			— v. Englegraaf	760			— v. Pye	736. 737. 740. 744. 747			Gould v. Gapper	465. 466			Govier v. Hancock	422. 647																																																																										
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# A PRACTICAL TREATISE OF THE LAW OF MARRIAGE AND DIVORCE.

## CHAPTER I.

### OF THE GENERAL NATURE OF THE MARRIAGE CONTRACT, AND ORIGIN OF THE LAW OF MARRIAGE.

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#### SECT. 1.—OF THE GENERAL NATURE OF THE MARRIAGE CONTRACT.

*Definition of Marriage.*—MARRIAGE is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife. The civil law defines marriage to be "*Conjunctio maris et fœminæ consortium omnis vitæ divini et humani juris communicatio.*"(a) Marriage is the lawful coupling and joining together of man and woman in one individual \*state or [ \*2 ] society of life, during the lifetime of one of the parties, and [ \*2 ] this society of life is contracted by the consent and mutual goodwill of the parties towards each other.(b)

There are various definitions of marriage. Thus it has been defined to be "*Viri et mulieris conjunctio, individuum vitæ consuetudinem continens;*" or as expressed by Sir George Mackenzie,(c) "Marriage is the conjunction of man and woman vowing to live inseparably together until death." Lord President Stair(d) considers it to be a voluntary contract by engagement, because the application of it is, and ought to be, of the most free consent; and because, in matters circumstantial, it is voluntary as in the succession of the issue and the provision of the wife and children; yet that marriage itself, and the obligations thence arising, are *jure divino*.

(a) Dig. lib. 23, tit. 2, s. 1.

(b) Ayl. Parer. 359.

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(c) B. I. tit. 6, s. 1.

(d) Inst. tit. 4, s. 1, p. 22.

From various learned authors it may be inferred that marriage is, according to the primitive law of God and Nature, for the mutual help of husband and wife—the propagation of the human race—the educating and instructing their children in the fear and love of God, and training them to be useful members of society.(e) It is a solemn contract, whereby a man and a woman, for their mutual benefit, and the procreation of children, engage to live in a kind and affectionate manner; it seems also to partake of the nature of a vow, and cannot, like other contracts, be dissolved by the mutual consent of the parties.(f)

Marriage has been thus beautifully delineated by a modern divine: "It is the means of comfort to the married pair, the preservation and comfort of children, the source of all natural relations of mankind, and the gentle and useful natural affection; the source of all industry and economy; the ground of all education and knowledge, and of civility and sweetness; the origin of all subordination and government, and consequently of all peace and safety in the world; and, finally, the foundation of all religion, as it prevents promiscuous concubinage, \*and the children grow up and perform Christian duties."(g)

*Characteristics of Marriage Contract.*—The characteristic feature of the marriage contract is its permanency; for although it originates in the will of the parties, yet, after being contracted, the duration of the union is totally independent of the will of the parties. In entering into the marriage state it is expressly declared, that the parties shall be joined together till death shall separate them; and in this the marriage contract is distinguished from every other species of contract. Besides the procreation and education of children, marriage has for its object the mutual society, help, and comfort that the one ought to have of the other, both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. The importance of this contract is sufficiently obvious, since it is the basis of civilized society and of sound morals, and the source of the domestic affections, and of the delicate ties and relations subsisting between parents and children and other degrees of kindred.(h)

(e) 1 Halkerton's Digest of the Law of Scotland relating to marriage, 3.

(f) Brown's Dictionary of the Bible, tit. Marriage.

(g) Dwight's Theology, Sermon 119.

(h) The public use of marriage institutions consists, according to Archdeacon Paley, in promoting the following beneficial effects:—

1. The private comfort of individuals, especially of the female sex. It may be true, that all are not interested in this reason; nevertheless, it is a reason to all for abstaining from any conduct which tends in its general consequence to obstruct marriages; for

whatever promotes the happiness of the majority is binding upon the whole.

2. The production of the greatest number of healthy children, their better education, and the making of due provision for their settlement in life.

3. The peace of human society, in cutting off a principal source of contention, by assigning one or more women to one man, and protecting his exclusive right by sanctions of morality and law.

4. The better government of society, by distributing the community into separate families, and appointing over each the authori-

\*The liberty of marriage is a natural right inherent in mankind, confirmed and enforced by the Holy Scriptures.<sup>(k)</sup> [ \*4 ] But notwithstanding the origin and divine institution of marriage, human legislatures have very properly assumed the power of regulating the exercise of the right of marriage, on account of leading to relations duties, and consequences, materially affecting the welfare and peace of society. It has been the policy of legislators, proceeding on the ground that marriage is the origin of all relations, and consequently the first element of all social duties, to preserve the sacred nature of this contract. In Christian countries this union has been confined to pairs, and with a few exceptions the contract has been rendered indissoluble—regulations which have contributed more towards the general peace, happiness, and civilization of the world, than any other civil institution. The public, as well \*as the parties themselves have an interest in making so important a contract a [ \*5 ] matter of certainty; hence the expediency of requiring certain solemnities of a public nature for the constitution of the contract, and for preserving evidence of it.

*Validity depends upon Conformity to Law.*—Marriage being a civil contract, its validity depends on its having been celebrated in the manner, and with the formalities required by law. In some countries only one form of contracting marriage is acknowledged; thus in England, after the first Marriage Act,<sup>(l)</sup> with the exception of Jews and Quakers, all marriages were required to be celebrated according to the form prescribed by the Church of England. An

ty of a master of a family, which has more actual influence than all civil authority put together.

5. The same end in the additional security which the state receives for the good behaviour of its citizens, from the solicitude they feel for the welfare of their children, and from their being confined to permanent habitations.

6. The encouragement of industry.

Some ancient nations appear to have been more sensible of the importance of marriage institutions than we are. The Spartans obliged their citizens to marry by penalties, and the Romans encouraged theirs by the *jus trium liberorum*. A man who had no child was intitled by the Roman law only to one-half of any legacy that should be left him; that is, at the most could only receive one-half of the testator's fortune.—Paley's *Principles of Moral and Political Philosophy*, 8vo. 20th ed. pp. 288-9, b. 3, part 3, ch. 1.

(k) The alliance of marriage with religion is no further considered in this work than in relation to those religious rites which are made essential to the validity of the contract by municipal law.

The following texts of Scripture are principally relied on by divines in support of the proposition that the state of marriage is of divine institution. In the second chapter of Genesis, v. 18, 21—25, the following simple and explicit account of the original institution and obligation of marriage, is given:—

“And the Lord God said, it is not good that the man should be alone, I will make him an help meet for him. And the Lord God caused a deep sleep to fall upon Adam, and he slept; and he took one of his ribs, and closed up the flesh instead thereof; and the rib which the Lord God had taken from man, made he a woman, and brought her unto the man. And Adam said, this is now bone of my bone and flesh of my flesh; she shall be called woman, because she was taken out of man. Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh.”

A distinct acknowledgment of the Mosaic account of the origin and obligations of marriage is contained in the New Testament:—

“Have ye not read, that He, which made them at the beginning, made them male and female, and said, for this cause shall a man leave father and mother, and shall cleave to his wife; and they twain shall be one flesh. Wherefore they are no more twain but one flesh. What therefore God hath joined together, let no man put asunder.”—Matt. ch. xix. v. 4, 5, 6.

See also the fifth chapter of Epist. to Ephesians, v. 28, 31. See Dr. Molesworth's Thirtieth Sermon on the Origin and Nature of the Marriage Contract. Dwight's Theology, Sermon 119.

(l) 26 Geo. 2, c. 33.



option is given to the parties, by a recent statute,<sup>(m)</sup> of celebrating marriage in another form; but notwithstanding, all marriages in England not celebrated in one of the modes required by the Marriage Acts are mere nullities; there is and can be no such thing in England as an irregular marriage. In some countries all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established.<sup>(n)</sup>

One principle pervades all the different modes of celebrating marriage, which is, that the matrimonial union is in all cases to be established by consent alone; and that the formalities which the laws of different states require, are nothing more than so many modes of declaring or substantiating this consent. They all have a reference to the publicity or evidence of the marriage; but the source of the obligation is consent, which founds the relation of husband and wife, anterior to all succeeding ceremonies and formalities, and to any carnal connection. From the very nature of the thing it could not be otherwise; for it were absurd to rest in any degree the validity of a permanent and rational society for life, on the momentary gratification of an animal passion; and it may be \*affirmed without [ \*6 ] the fear of contradiction, that in every nation on the globe, which is but one stage removed from barbarism, the constitution of marriage is derived from consent, duly authenticated, independent of the *conjunctio coporum*.<sup>(o)</sup>

*Marriage a Contract.*—It is observed by a learned writer, that “matrimony is a civil contract, the essence of which, as of all contracts, is the consent of the parties. But the contract, from its object, being the procreation of the species, has necessarily reference to other beings than those whose hands are joined in wedlock; and the public good requires that the interests of the expected progeny should be protected by adequate conditions annexed to the contract. Experience, independently of religion, teaches that the great ends of matrimony cannot be fulfilled without imprinting on it a character of indissolubility, unless for such a breach of obligation as would render a forced continuance of the union hurtful to society. The law has therefore imposed on the contract of marriage such a condition; and it is unphilosophical to infer from the indissolubility, at the pleasure of the contracting parties, that it is something different from a contract. It is the law, as the expression of the general will, that gives effect to, and supports all contracts; and that which supports may impose conditions on what demands its sanction. All who enjoy the protection of society are bound to conform to its rules, and every one who contracts matrimony knows the terms of his engagement. It is no less unphilosophical to maintain that, though the law declares null all such contracts as are entered into without conformity to the

(m) 6 & 7 Will. 4, c. 85.

(n) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Scotland relating to Marriage, 76.

(o) 1 Halkerton's Digest of the Law of

enactments of the legislature, the marriages still are valid—because human laws cannot reach them.”(p)

In prescribing a form of celebration, there seems little or nothing inconsistent with the principle, that marriage is constituted by the consent of the parties, since all which either law or religion requires is, that the consent shall be given in such a solemn manner as may not only preclude all pretence \*of the want of a deliberate purpose, but render the contract of the sacred and important [ \*7 ] nature which it so justly merits.(q)

*Origin of Contract.*—Marriage, in its origin, is a contract of natural law antecedent to its becoming in civil society a civil contract, regulated and prescribed by law and endowed with civil consequences. Superadded to this, in most civilized countries, acting under a sense of the force of sacred obligations, it is a religious contract, the consent of the individuals pledged to each other being ratified and consecrated by a vow to God. This, generally speaking, is the idea of marriage as entertained in every country where the Christian religion prevails.(r)

The forms observed in the celebration of marriage, and the laws which prescribe what is essential to the validity of that contract, have been various in different ages and countries.

The consent of the contracting parties, and not carnal intercourse, forms the essence of the marriage contract. *Consensus non concubitus facit matrimonium*, the maxim of the Roman civil law, is in truth the maxim of all law upon the subject; for the *concubitus* may take place for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something more; it must be an agreement of the parties, looking to the *consortium vitæ*;(s) an agreement, indeed, of the parties capable of the *concubitus*; for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate,\*that the incapacity of either party to satisfy that duty nullifies the con- [ \*8 ] tract.(u) That consent is the very essence and foundation of marriage, is supported by several authorities in the civil law.(v)

(p) 1 Stair's Inst. 25, n. by Brodie.

(q) 1 Stair's Inst. 25, n. by Brodie.

(r) Blackstone observes, 1 Comm. 433, “Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience.” These words of the learned commentator may be understood to mean that human laws have no concern with marriage but in one light, that is, as its consequences affect civil society, they consider it only in part; their province is not to meddle with the divine nature of the contract, that belongs to religion. The law does not question the religious nature of the contract, or assume that it is nothing more than a civil contract, but deals only with those conse-

quences and accidental circumstances of it, which affect the community as a temporal body. Our laws and judges may bind and unbind, as far as civil obligations extend; but the divine obligations belong to the jurisdiction of another law and another judge.—See Dr. Molesworth's 33d Sermon on the Origin and Nature of the Marriage Contract, p. 98, 99. See post, pp. 14—16.

(s) Dig. lib. 23, tit. 2, l. 1; Inst. lib. 1, tit. 9, s. 1.

(u) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 62, 63; Dodson, 11. See Code 2 et 3, Extra de Spons. et Matrim. Vinnius, lib. 1, tit. 9, s. 1; Burn's Eccl. Law, vol. ii. p. 500; Ayl. Par. 227.

(v) Huber, lib. 1, tit. 10, s. 1; De Nuptiis; Vinnius, lib. 1, tit. 9, p. 58; Voet, lib. 23, tit. 2, s. 2.

According to the law of nature antecedent to civil institutions, marriage might take place, to all intents and purposes, wherever two persons of different sexes engaged by mutual contracts to live together.<sup>(x)</sup> In most countries marriage is also clothed with religious rights; even in rude societies, as well as in those which are more distinguished for their civil and religious institutions. Yet in many of those societies marriages may be irregular, informal, and discountenanced on that account, yet not invalidated. The rule prevailed in all times as the rule of the canon law, which existed in this country and in Scotland till other civil regulations interfered in this country; and it is the rule which prevails in many countries of the world at this day, that a mutual engagement or *betrothment* is a good marriage, without consummation, according to the law of nature, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring by the law of nature, that is complete. It is not necessary that actual use and possession should have intervened to complete the *vinculum fidei*. The *vinculum* follows on the contract, without consummation, if expressed in present terms; and the canon law itself, with all its attachments to ecclesiastical forms, adopts this view of the subject, as is well described by Swinburne, in his book of *Espousals*,<sup>(y)</sup> where he says, "That it is a present and perfect consent, the which alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only."<sup>(z)</sup>

[ \*9 ] *\*Marriage according to the Law of Nature.*—It is hardly necessary to observe, that a mere casual commerce between sexes, without the intention of cohabitation, does not constitute marriage even by the law of nature. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes might safely be presumed to be, as it is popularly called, *a marriage in the sight of God*.

It has been made a question, how long the cohabitation must continue by the law of nature—whether to the end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in a state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it on very different principles in different countries. In some there is a *communio bonorum*, a community of goods; in some, each retain their separate property.<sup>(a)</sup> By the law of England, the personal estate is vested absolutely in the husband, who also acquires temporary rights in his wife's real estate.

(x) 1 Hagg. Cons. R. 230.

231, 232.

(a) *Lindo v. Belisario*, 1 Hagg. Cons. R. 231.

But rights of property have nothing to do with marriage, considered with reference to the formation of the contract,(b) for marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

*Morganatic Marriage.*—In the middle ages, a custom prevailed which has been thought to have introduced an intermediate state between matrimony and concubinage; it was called a Morganatic marriage. "The name denotes its Germanic origin,(c) and it is even yet not quite out of use in that country, under the appellation of a left-handed marriage; but the earliest and clearest description of it is to be found in the Book of Feuds, though it is there wrongly attributed to the \*Salic law, in which no trace of it appears, by a [ \*10 ] mistake, not unusual, of referring all the customs of the Franks to that code. It is defined to be the lawful and inseparable conjunction of a single man, of noble or illustrious birth only, with a single woman of an inferior or plebeian station, upon these conditions, that neither the wife nor her children should partake of the titles, arms or dignity of the husband, or succeed to his inheritance, but should be contented with a certain allowance, assigned to them by the Morganatic contract. But since these restrictions relate only to the rank of the parties, and the succession to property, without effecting the real nature of a matrimonial engagement, it must be considered in the light of a just marriage, of which it has every essential character. The marriage ceremony was in general regularly performed; the union was for life and indissoluble, and the children in other respects legitimate. This connection was very usual in most countries of Europe; but I cannot find sufficient proof that the concubines of Charlemagne, and some of the early kings of France, were wives of this description; nor is there occasion to resort to that supposition, in defence of their conduct, since the state of concubinage itself was little inferior to this in the public estimation."(d)

*Concubinage.*—A concubine did not mean in the civil law a harlot; the concubine was a person taken to cohabit in the manner, and under the character, of a wife, but without being authorized thereto by a legal marriage. Concubinage was confined to a single person, was of perpetual obligation as much as marriage itself; was a society recognized by the laws, and in general entered into between persons who, by laws of policy, were forbidden by the state to marry together for want of quality or fortune; the concubine might even be accused of adultery. Those characters show how widely mistaken we should be if we annexed the idea of immodesty and contempt to the name of concubine among the ancients, as we do in modern times.(e)

(b) *Ib.* 236.

(c) See 1 Frederician Code, p. 135, b. 2, art. 3; Pothier *Traité du Contrat de Mariage*, part 1, ch. 2, s. 2.

(d) Sir A. Croke's Introduction to the case of *Horne v. Liddiard*, 115—117.

(e) 1 Brown's Civil Law, 80, 81. A concubine, in the strict sense of the civilians, was a woman of servile and plebeian extraction, the sole and faithful companion of a Roman citizen who continued in a state of

celibacy. Her modest station, below the honours of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws. From the age of Augustus to the 10th century, the use of this secondary marriage prevailed both in the west and east, and the humble virtues of a concubine were often preferred to the pomp and insolence of a noble matron. 5 Gibbon's Hist. 393, 400, &c. 1823.

According to the law of nature antecedent to civil institutions, marriage might take place, to all intents and purposes, wherever two persons of different sexes engaged by mutual contracts to live together.(x) In most countries marriage is also clothed with religious rights; even in rude societies, as well as in those which are more distinguished for their civil and religious institutions. Yet in many of those societies marriages may be irregular, informal, and discountenanced on that account, yet not invalidated. The rule prevailed in all times as the rule of the canon law, which existed in this country and in Scotland till other civil regulations interfered in this country; and it is the rule which prevails in many countries of the world at this day, that a mutual engagement or *betrothment* is a good marriage, without consummation, according to the law of nature, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring by the law of nature, that is complete. It is not necessary that actual use and possession should have intervened to complete the *vinculum fidei*. The *vinculum* follows on the contract, without consummation, if expressed in present terms; and the canon law itself, with all its attachments to ecclesiastical forms, adopts this view of the subject, as is well described by Swinburne, in his book of Espousals,(y) where he says, "That it is a present and perfect consent, the which alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only."(z)

[ \*9 ] *\*Marriage according to the Law of Nature.*—It is hardly necessary to observe, that a mere casual commerce between sexes, without the intention of cohabitation, does not constitute marriage even by the law of nature. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes might safely be presumed to be, as it is popularly called, *a marriage in the sight of God*.

It has been made a question, how long the cohabitation must continue by the law of nature—whether to the end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in a state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it on very different principles in different countries. In some there is a *communio bonorum*, a community of goods; in some, each retain their separate property.(a) By the law of England, the personal estate is vested absolutely in the husband, who also acquires temporary rights in his wife's real estate.

(x) 1 Hagg. Cons. R. 230.

231, 232.

(y) Sect. 4.

(a) *Lindo v. Belisario*, 1 Hagg. Cons. R.

(z) *Linao v. Belisario*, 1 Hagg. Cons. R. 231.

But rights of property have nothing to do with marriage, considered with reference to the formation of the contract,(b) for marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

*Morganatic Marriage.*—In the middle ages, a custom prevailed which has been thought to have introduced an intermediate state between matrimony and concubinage; it was called a Morganatic marriage. "The name denotes its Germanic origin,(c) and it is even yet not quite out of use in that country, under the appellation of a left-handed marriage; but the earliest and clearest description of it is to be found in the Book of Feuds, though it is there wrongly attributed to the \*Salic law, in which no trace of it appears, by a mistake, not unusual, of referring all the customs of the [ \*10 ] Franks to that code. It is defined to be the lawful and inseparable conjunction of a single man, of noble or illustrious birth only, with a single woman of an inferior or plebeian station, upon these conditions; that neither the wife nor her children should partake of the titles, arms or dignity of the husband, or succeed to his inheritance, but should be contented with a certain allowance, assigned to them by the Morganatic contract. But since these restrictions relate only to the rank of the parties, and the succession to property, without effecting the real nature of a matrimonial engagement, it must be considered in the light of a just marriage, of which it has every essential character. The marriage ceremony was in general regularly performed; the union was for life and indissoluble, and the children in other respects legitimate. This connection was very usual in most countries of Europe; but I cannot find sufficient proof that the concubines of Charlemagne, and some of the early kings of France, were wives of this description; nor is there occasion to resort to that supposition, in defence of their conduct, since the state of concubinage itself was little inferior to this in the public estimation."(d)

*Concubinage.*—A concubine did not mean in the civil law a harlot; the concubine was a person taken to cohabit in the manner, and under the character, of a wife, but without being authorized thereto by a legal marriage. Concubinage was confined to a single person, was of perpetual obligation as much as marriage itself; was a society recognized by the laws, and in general entered into between persons who, by laws of policy, were forbidden by the state to marry together for want of quality or fortune; the concubine might even be accused of adultery. Those characters show how widely mistaken we should be if we annexed the idea of immodesty and contempt to the name of concubine among the ancients, as we do in modern times.(e)

(b) Ib. 236.

(c) See 1 Frederican Code, p. 135, b. 2, art. 3; Pothier *Traité du Contrat de Mariage*, part 1, ch. 2, s. 2.

(d) Sir A. Croke's Introduction to the case of *Horne v. Liddiard*, 115—117.

(e) 1 Brown's Civil Law, 80, 81. A concubine, in the strict sense of the civilians, was a woman of servile and plebeian extraction, the sole and faithful companion of a Roman citizen who continued in a state of

celibacy. Her modest station, below the honours of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws. From the age of Augustus to the 10th century, the use of this secondary marriage prevailed both in the west and east, and the humble virtues of a concubine were often preferred to the pomp and insolence of a noble matron. 5 Gibbon's Hist. 393, 400, &c. 1823.

Concubinage, or the union, something more than temporary of one [ \*11 ] man with one woman, has always had its advocates, \*and plausible arguments have been advanced to prove it to have all the advantages and effects of marriage itself. But a question similar to the injunction of St. Ambrose, quoted in the canon law, will ever suggest itself. "If your connection differs from marriage, in the duration, or other respects, it cannot fulfil the purposes of marriage; if it does not differ in substance, why not add the ceremony?" In a state of nature, this nude connection may answer the demands of duty; but, in established societies, the obligations of a citizen require that it should be clothed with the forms in which it has been invested by the laws. The most important ends of the association between the sexes can only be obtained by its permanency and continuing for life. Marriage is a solemn contract to that effect, entered into in the face of the world, in the manner appointed by law. To strengthen this engagement to natural obligation, laws superadd their compulsion. There is a much greater security that such an union should be permanent, than where it depends solely upon the will of the parties, liable to be dissolved at pleasure. Concubinage differs, therefore, from marriage, by being defective in its most important and essential quality; and the superior firmness of the matrimonial union, beyond a mere voluntary connection, is, perhaps, one of the greatest advantages which arise from the establishment of civil society. (f)

It is observed by a modern writer, that "The value of the institution of marriage cannot be placed before us in a more striking point of view, than by contrasting the situation of the offspring of marriage, with that of the miserable, and often outcast, children born out of the pale of wedlock. These, commonly destitute of a father's care and authority, and sometimes of even both the parents, who are either regardless or ashamed of the child of their disgrace, are sent forth unarmed and unprotected amidst the snares and temptations of the [ \*12 ] \*world. Too often do the streets of our metropolis find the ranks of crime largely recruited from those unhappy beings, in whom no father's authority has interposed to arrest the early advances of wickedness, and over whom no mother's care has watched to sow in their infant minds those principles and seeds of holiness, which might preoccupy the ground, and spring up to maintain possession of it, against the deadly and rank harvest sown by the enemy of their souls. Nay, what is worse, the guilty parents, instead of guarding and directing the feeble steps of the illegitimate child, are too well prepared themselves to set the example, and become his leaders, in the course of that guilt in which his very being originated. How different from this are the virtuous associations, the hallowed and gentle bonds which have their origin 'in the holy estate of matrimony.' Here no feelings of shame and disgrace interfere, to cause them, in violation of the gracious claims of natural affection, to shun their offspring. Few will be found so depraved as altogether to treat with contempt these awful claims, and still fewer to run counter to the feelings of natural affection; when, instead of being stifled by the

(f) *Introduction to the case of Horner v. Paley's Moral and Political Philosophy*, b. *Liddiard*, by Sir A. Croke, pp. 17, 18. See vt. 3, c. 2.

danger of infamy or punishment, those feelings are cherished and encouraged by the approbation of God and man. But this care will not be confined merely to their spiritual instruction; it will extend itself also to a care for their bodily comfort, and to their capability of fulfilling honourably and beneficially their duties in that station of society which the providence of God shall be pleased to assign to them. Hence the community derives most of those advantages which may accrue to it from a race of citizens, whose bodily vigour and mental endowments fit them to perform well its offices. Neither, on the other hand, must it be forgotten, that, while the institution of marriage prevents the state from being burthened with the maintenance of those, whose helplessness, profligate, or self-condemned parents might abandon, a similar security is provided, by the self same institution, against the destitute parent being left by his offspring in the feebleness of old age, either to perish or to be a burthen to the community. The affection and honour established between the offspring of matrimony and their parents, is likely to be reciprocal; and those sacred relations which bind the parent to feel an \*interest [ \*13 ] and obligation for the maintenance of the child, also bind the child, when he shall have become of age and ability, to honour and support the parent, from whom he derived his existence, and to whose affectionate cares he is indebted for his preservation. To these advantages which society reaps from this ordinance, must be added the immense benefits which arise from the spur applied to human industry and enterprise, by the necessities and relations to which matrimony gives birth. The extent of these is incalculable. From the affectionate desire to promote the welfare of their families, or from a conscientious earnestness to fulfil the obligations to which parents have rendered themselves liable, have arisen in no small degree the multiplied inventions of scientific research, and the immense and accumulated achievements of the excited energies of the human mind. While, on the other hand, the combination of efforts, and the aids of mutual support, brought about by the natural associations of husbands and wives, parent and children, brothers and sisters, have given tenfold strength to individual exertion. Who can reflect a moment on these, and not see the gigantic scale on which these associations must operate on the comfort and welfare of every community, wherein they prevail and are respected? The state, as well as individuals, may apply to children the exclamation of the Psalmist, they are 'like as the arrows in the hand of the giant.' "(g)

*Marriage, how considered.*—Marriage is considered in various lights by different laws. The Roman had respect principally to its civil effects, as it produced in the husband and wife a mutual participation of benefits and right. The Romans did not however omit all religious rites on the perfection of this contract, but their laws viewed it merely as a civil covenant, however Heaven might preside over its ratification. Those rites were not any part of its essence; it was good without them. The Canonists consider it in a religious light, and define it a sacrament peculiar to the laity, by which a man and woman are joined together according to the precepts of the church.

(g) Dr. Molesworth on the Purposes and laint, Sermon 34, pp. 109—113.  
*Solemnization of Marriage: Domestic Chap.*



Among Protestants it is considered partly as a holy union of divine [ \*14 ] institution, partly as a civil \*contract; in the latter view alone it is regarded by the temporal courts; its sacred bonds being left entirely to the guardianship of the spiritual tribunals.(h)

Two opinions have been held by writers on the subject of marriage. It is held by some persons that marriage is a contract merely civil; by others, that it is a sacred, religious, and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of the latter description; but in a more correct view of this subject neither of those opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not *merely* either a civil or religious contract; and at the present time it is not to be considered as originally and simply one or the other.(i)

In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded; it then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance with respect both to its theological and its legal constitution; though it is not unworthy of remark, that amidst the manifold ritual provisions made by the divine lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded on the wisdom of man), although in conformity to the prevailing theological opinion, it revered marriage as a sacrament, still so far respected its natural and civil origin, as to consider, that where the [ \*15 ] natural and civil contract was formed \*it had the full essence of matrimony, without the intervention of the priest; it had even in that state the character of a sacrament, for it is a misapprehension to suppose that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent.(k)

When popery, ignorance, and superstition, rode triumphant in every part of Europe, the Court of Rome took care to establish every regulation they could think of, that might tend towards rendering applications necessary and frequent to the holy see, from every one of which they knew how to draw large fees and perquisites. For this purpose they extended considerably the prohibited degrees of marriage, and for this purpose they made the marriage contract a sacrament, a

(h) 1 Brown's Civil Law, 50, 51.

(i) 1 Hagg. Con. R. 230, 417.

(k) 2 Hagg. C. R. 62—65; Sanchez, lib. 2.

disp. 6, s. 2, et lib. 2, disp. 10, s. 2; Father Paul, p. 737; Pallavicini, lib. 23, ch. 8; Pothier, tit. 3, p. 290.

sacred and divine contract, which no unhallowed law was to meddle with. But the pope, by his dispensation, could make any marriage lawful; and by his decree he could dissolve the most regular and solemn marriage that was ever entered into, and that without so much as consulting the laws of the society or country were such marriage was to be, or had been solemnized; for the church, that is to say the Court of Rome, had then assumed the sole power of regulating and of judging of every thing relating to marriage; though we have the most authentic proof that this was not the practice during the first ages of Christianity; for among the Romans, divorces by mutual consent were allowed for a long time after the establishment of Christianity, as appears by several laws of the first Christian Emperors, and such divorces were prohibited by the law of the Emperor Justinian, and again introduced by a law of the Emperor Justin, without the intervention, and, for what appears, without so much as consulting any bishop or ecclesiastical assembly. (l)

At the Reformation, this country disclaimed, amongst other opinions of the Romish church, the doctrine of a sacrament in marriage, (m) though still retaining the idea of its being of \*divine institution in its general origin; and on that account, as well as [ \*16 ] of the religious forms that were prescribed for its regular celebration, an *holy estate*, *holy matrimony*, but it likewise retained those rules of the canon law which had their foundation not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts therefore, which had the cognizance of matrimonial causes, enforced these rules, and, amongst others, that rule which held an irregular marriage constituted *per verba de presenti*, not followed by proof of consummation, valid to the full extent of voiding a subsequent regular marriage contracted with another person. (n)

The recent statute, 6 & 7 Will. 4, c. 85, recognizes marriage as a civil contract only; for by the 20th section of that act marriages may be solemnized in places registered for the purpose in the presence of some registrar and of two witnesses, according to such form and ceremony as the parties may see fit to adopt; provided each of the parties solemnly declare that they do not know of any lawful impediment to the marriage, and each of the parties call upon the persons present to witness that they take each other for husband and wife. The object of this provision is to enable those who may take different views of the religious nature of the contract, or who have other objections to the religious solemnization of marriage, to enter into its engagements according to their own views.

*Peculiarities of Marriage Contract.*—Marriage is a contract of a peculiar nature, and differing, in some respects, from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all

(l) Parl. History, vol. 15, pp. 8, 9. See Harris's Just. lib. 1, tit. 10, p. 3<sup>d</sup>.

(m) By the 25th article of the Church of England it is declared, "there are two sacraments ordained of Christ our Lord in the

Gospel, that is to say, Baptism and the Supper of the Lord."

(n) *Dalrymple v. Dalrymple*, 2 Hagg. C. R. 67; Dodson, 16; Brower, L. 22, 12.

other contracts; rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations, or duties arising from it, are not left entirely to be regulated by the agreements of parties, but are to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of [ \*17 ] their will. It confers the *status* of legitimacy on children \*born in wedlock, with all the consequential rights, duties and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, and the like, from performing his part of the mutual contract.

No wonder that the rights, duties, and obligations, arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country; and such laws must be considered as forming a most essential part of the public law of the country. As to the constitution of the marriage, as it is merely a personal, consensual contract, it must be valid every where, if celebrated according to the *lex loci*; but with regard to the rights, duties, and obligations, thence arising, the law of the domicile must be looked to.(o)

## SECT. 2. THE CANON LAW THE BASIS OF THE LAW OF MARRIAGE.

*Canon Law.*—The Canon Law is the basis of the law of marriage throughout Europe, except so far as it has been altered by the municipal law of particular states.(p) Although there are principles of marriage law generally prevailing in Europe, yet the Canon Law subsists under very different modifications in different countries.(q)

*Council of Trent.*—An important alteration was made in the law of marriage in many countries by the decree of the Council of Trent, [ \*18 ] held for the reformation of marriage.(r) \*The decrees of that council, which are the standing rules of the Romish

(o) See Fergusson's Rep. 397, 398.

(p) 1 Dow, 181; 2 Hagg. C. R. 70, 81.

(q) 1 Hagg. C. R. 260.

(r) See *Canones et Decreta Concilii Trident. sess. 24, c. 1.* This celebrated council was held in the bishopric of Trent, a province of Germany, in the circle of Austria, situated upon the Alps. It sat with some intermissions from the year 1545 to 1563, when the doctrine of the Pope's infallibility transubstantiation, &c. were confirmed. The council was first opened under Paul the 3d, on 13 December, 1545, continued under Julius the 3rd, interrupted under Marcellus the 2nd and Paul 4th by the wars and troubles of the continent, and terminated about the year 1563, and was confirmed by a bull signed by a legate of the Holy See, who, ac-

cording to the practice of all ages, presided at the assembly. Halkerstone's Dig. 69, n. See Hist. of this Council by Father Paul, fol. Lond. 1676; and Pallavicino.

"There is, amongst the true believers, nothing more certain and undoubted than that the marriage contract has been elevated to the dignity of a sacrament; this is a truth inherent to the Roman Catholic tenets, established by the sovereign pontiff, Eugene IV., in his decree instituted for the Armenians, 's. 7, repeated by the Holy Council of Trent, in section 24, Of the Reform of Marriage, chapter 1.' and learnedly upheld and illustrated by Bellarmine, in his book intitled 'Of Holy Marriage,' against the attacks of Luther, Calvin, and other heretics. In order, therefore, that the faithful should celebrate

Church, were never received as of authority in \*England or in Scotland,(s) but are the law in several countries of [ \*19 ] Europe at the present day.(t)

The decree of the Council of Trent were never admitted as of authority in France. The ordinance of Blois, art. 44; the edict of Henry 4, of December, 1606; and the declaration of Louis XIII. 1639, art. 1, constituted the marriage law of the kingdom before the Revolution.(u)

By that decree the presence of the parish priest and two witnesses are made requisite to the validity of a marriage. It also contained a prohibition against clandestine marriages, but such marriages, though illicit, are notwithstanding valid and indissoluble.(x)

the marriage most religiously, which the Apostle, in his Epistle to the Ephesians, chap. 5, denominates 'a great sacrament in Christ'; and in the church, from the earliest times of the church itself, it has been instituted and held, that the marriage ought to be celebrated before the priest by whom it was validated with his benediction. However, whatever may have been the ancient discipline respecting the validity of those marriages which had been celebrated without the assistance of the rector, it is now beyond all doubt, that no marriage can at present be validly celebrated unless with observance of the forms prescribed by the Holy Council of Trent. That doctrine appears to be strictly established by the said council in section 24 'Of the Reform of Marriage,' chap. 1, in which we find the following passage: 'Qui aliter, quam præsente parochio, vel alio sacerdote, de ipsius parochi seu ordinaris licentia, et duobus vel tribus testibus matrimonium contrahere attentabant, eos sancta. Synodus ad sic contrahendum omnino inhabiles reddet et hujusmodi contractus irritos et nullos esse decernit, prout eos præsentis decreto irritos facit et a nullat.'—Concilii Trident, canones et decreta, p. 250, ed. 1615. "If any person shall presume to contract marriage otherwise than in the presence of the parish rector, or of another priest delegated by the said parish rector or the ordinary, and in the presence of two or three witnesses, the holy synod renders them unfit for so contracting; and it declares such contracts as null and void, as by this present decree it renders void and annuls the same. And it is hereby declared, that the marriage benediction shall be given by the proper parish rector, and that the license for so giving the said benediction cannot be granted to another priest by any other person than the rector himself or the ordinary." It is therefore quite clear, that in Rome, and in all other places where the Council of Trent is received, the marriage must be celebrated before the proper parish rector, and in the presence of two witnesses. By "proper rector" is to be understood the rector in whose parish the contracting par-

ties have their residence; and as it may happen that the two contracting parties are resident in two different parishes, it will then be sufficient for the validity of the marriage, that the act be performed with the intervention of the parish rector of either of the parties. And this principle is so far a matter of strict rule, that even foreigners and travellers who may happen to be making but a temporary sojourn in some place where the Council of Trent is received, cannot validly contract marriage without observing that formality, as amongst other matters is laid down and explained by Pirking in the Decretal, book iv. title 3, a. 2. No. 10, in which is contained the following (from the Latin.) "Foreigners who are merely passing through a place in which a decree of the Council of Trent is received, cannot validly contract marriage unless it be done with the assistance of the parish rector, and before witnesses, even should the said decree not be received at the place in which they make their residence, because they are bound to observe the laws of the place through which they are then passing. In addition to this, neither the parish rector or the ordinary himself, or any other superior authority, could grant faculty for uniting in marriage two persons who were not Roman Catholics, because it is an absurdity that those who are disunited from the church should be made participators of a sacrament of that same church."—From the deposition of Belloni, Doctor of Civil and Canon Law, stated in joint appendix to the case of *Swift v. Kelly*, before the judgment committee of the Privy Council, pp. 138, 139.

(s) 2 Hag. C. R. 82.

(t) *Ib.* 273; 3 Phill. R. 63, 64.

(u) 1 Burge on Foreign Law, 175.

(x) *Herbert v. Herbert*, 2 Hag. Cons. R. 274; 3 Phill. R. 64. The Council of Trent distinctly recognizes the validity of clandestine marriages, "Tametsi dubitandum non est clandestina matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu ea ecclesia irrita non fecit; et proinde jure dammandi sunt illi ut eos sancta synodus anathemate damnet, quia ea

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*Source of the Ecclesiastical Laws of England.*—The ecclesiastical laws of this country have been for the most part derived originally from the authority exercised by the Roman pontiffs, in the different states and kingdoms of Europe.(y) Spelman mentions the adoption of the decrees and canons of the Church of Rome, as they then existed, [ \*20 ] by the clergy and \*people of England so early as the year 605, soon after the establishment of Christianity in this country; and there were ecclesiastical councils in England, and canons passed therein before the conquest. From the middle of the 12th century, a system of laws, under the influence of successive popes, has been compiled and promulgated at different periods. This system has been generally diffused throughout Europe, and prevails with more or less authority in different countries under the title of the canon law. About the year 1150, that part which is called the Decretum was collected by Gratian, the monk, out of the fathers, doctors, and councils. In the next century, Pope Gregory IX. published five books of Decretals, collected from the Decretal Epistles of the popes; to which Boniface VIII. added a sixth book, about the end of the same century. The Clementine constitutions were next compiled by Clement V., and published by his successor, John XXI., at Avignon, in 1317, who afterwards collected some further constitutions, which were published after his death, about the year 1340. A seventh book of Decretals, and a book of Institutes, were added by Gregory XIII., under whose sanction the Corpus Juris Canonici, containing all the above several parts, was published in 1580.(z) The pontifical law, so promulgated, says an eminent writer on the Law of Scotland, “extended to all persons and things belonging to the Roman Church, and separate from the laity; to all things relating to pious uses, to the guardianship of orphans, the wills of defuncts and matters of marriage and divorce; all which were exempted from the civil authority of the sovereigns, who were devoted to the see of Rome. So deeply has this law been rooted, that even where the pope’s authority has been rejected, yet consideration has been had to these laws, not only as those by which church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which, because of their weighty matter and their being received, may more fitly be retained than rejected.”(a) In England, however, the authority of the canon law was at all times much restricted, being considered, in many [ \*21 ] points, \*repugnant to the laws of England, or incompatible with the jurisdiction of the courts of common law: so much of it as has been received having been obtained by virtual adoption, has been for many centuries accommodated by our own lawyers to the local habits and customs of the country; and the ecclesiastical laws may be now described in the language of our statutes, as “laws which the people have taken at their free liberty, by their own con-

vera et rata esse negant; quique falso affirmant matrimonia, a filiis familias sine consensu parentum contracta, irrita esse et parentes ea rata vel irrita facere posse: nihilominus sancta Dei ecclesia ex justissimis causis illa semper detestata est atque prohibuit.”—*ha. et Dec. Con. Trid. sess. 24, c. 1.* See

1 Stair’s Inst. p. 25, n. by Brodie.

(y) See 2 Hallam’s Middle Ages, 286—289, 8vo. ed.

(z) 3 vols. fol. ed. 1620.

(a) Stair’s Inst. lib. 1, tit. 1, 7; 1 Bl. Comm. p. 53.

sent, to be used amongst them, and not as laws of any foreign prince, potentate or prelate.”(b) In addition to these authorities of foreign origin, must be enumerated also the constitutions passed in this country by the pope’s legates, Otho and Othobon, and the archbishop and bishops of England, assembled in national councils in 1237 and 1269; and a further body of constitutions, framed in provincial synods under the authority of successive archbishops of Canterbury, from Stephen Langton, 1222, to Archbishop Chicheley, 1414; and adopted also by the province of York in the reign of Henry 6.(c)

The canon law appears to be the basis of the matrimonial law of Scotland, according to Craig,(d) *totam hanc questionem pendere a jure pontificio*. Lord Stowell, proceeding on this assumption, said, “Whether that law remains entire or has been varied, I take it to be a safe conclusion, that in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same; show the variation and the court must follow it; but if none is shown, then must the court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto unknown in the Christian world.”(e) The extent to which the canon law is at this day held as part of the law of Scotland, is a point of great difficulty, which was much discussed in a recent case, but has not been fully cleared up. Although on the one hand, the canon law cannot of itself be admitted to be intitled to the authority of law [ \*22 ] in Scotland, in all matrimonial cases and in questions of legitimacy, yet on the other hand, it does not appear that it never can be held to have been law, unless where it is mentioned in acts of parliament, or in express decisions. It is clear that the canon law is not obligatory upon Scotland in the same way as their own acts of parliament. Neither is it as strong as the decisions of the Supreme Court. But still it is quite clear that it is one of the sources from which the law of Scotland, in matters ecclesiastical and matrimonial, is derived; and it has been followed in the Commissary Courts, both before and since the Reformation. As to these cases, it is one of the sources of Scotch law in the same manner as the civil law is one of the great sources of that law, in almost all other matters.(g)

Lord Justice Clerk said, “I know no authority which the canon law, or any other law, has in this country, except in so far as it has actually been adopted. But as to matters of marriage, I never thought at this day to have heard a doubt on the subject; for if the canon law is not our law of marriage, I would be glad to know what is our law. In all questions of marriage and legitimacy, the canon law is the law of Scotland.”(h)

(b) 25 Hen. 8, c. 21.

(c) 1 Bl. Comm. p. 83. See Preface to Burn’s Eccl. Law, by Tyrwhitt, p. 22, 23; Hale’s Hist. C. L. 26—29.

(d) Craig, lib. 2, dieg. 18, s. 17; 2 Hagg. Cons. R. 70.

(e) *Dalrymple v. Dalrymple*, 2 Hagg.

Cons. R. 81, 82.

(g) Lord Robertson, *Bell’s case of Putative Marriage*, 176; Lord Meadowbank, ib. 195; Stair, lib. 1, tit. 1, s. 16. See stat. passed 1567, c. 15.

(h) *Bell’s case of a Putative Marriage*, 203.

## SECT. 3.—HOW FAR THE CANONS ARE BINDING IN ENGLAND.

All the obligation of the canon law in this kingdom depends upon its having been received and admitted by parliament, or upon immemorial usage and custom.(i) There are no canons forming a part of the law of England, except such as have already been incorporated into it.(k)

By the statute 25 H. 8, c. 19, s. 7, repealed by the statute 1 & 2 Ph. & M. c. 8, and afterwards revived by the statute 1 Eliz. c. 1, it was [ \*23 ] provided, "that such canons, constitutions, ordinances, and synodals provincials already made, which be not contrariant to the laws, statutes, and customs of the realm, nor to the hurt of the king's prerogative, shall be used as before the said act, till otherwise ordered by thirty-two persons to be appointed according to the said act." And by the second section of the same statute, the king may nominate and assign at his pleasure thirty-two persons of his subjects, sixteen of the clergy, and sixteen of the temporality of upper and nether house of parliament, who shall have power to examine canons, &c. before made; and such as the king and the major part of them shall deem worthy to be continued shall be obeyed, so that the king's consent under the great seal be first had to the same, and the residue shall be void. But it was provided that no canons, constitutions, or ordinances should be put in execution in this realm by authority of the convocation of the clergy, which should be repugnant to the king's prerogative, or the customs, laws, or statutes of the realm.(l)

By stat. 3 & 4 Edw. 6, c. 11, the king was authorised during three years, by the advice of his council, to name thirty two persons to examine the ecclesiastical laws, and compile such laws not contrary to any common law or statute of the realm, as should be thought convenient for the spiritual courts. The commissioners appointed under this act, digested a work according to the method of the Roman decretals, and entitled *Reformatio Legum Ecclesiasticarum*.(m) But in consequence of the king's death before he had assented to the plan it fell to the ground, and was never afterwards resumed,(n) so that the authority of the canon law in England now depends upon the stat. 25 H. 8, c. 19.(o)

The convocation,(p) with the license of the crown under the great seal, may make canons in ecclesiastical matters, but cannot infringe the common law, statute law, or the king's prerogative.(q) The [ \*24 ] clergy are bound by canons confirmed \*by the king only, but they must be confirmed by parliament to bind the laity.(r)

All material ordinances or regulations made since the reformation for binding the laity as well as the clergy in mere ecclesiastical mat-

(i) Hale's Hist. C. L. 26—29.

(k) 8 T. R. 414; Vaugh. 327.

(l) See 27 Hen. 8, c. 15, 35 Hen. 8, c. 16, Statutes of the realm. See Vin. Abr. Canons; 2a. Dig. Canons.

Leod. 4to. 1640, De Matrimonio, p. 1; Adulterii et Divortii, 47—56; 7

Lingard's Hist. 127—129, 8vo. ed.

(n) See Godolphin, Rep. Can. 585.

(o) See 1 Bl. Com. 83.

(p) See Com. Dig. Convocation.

(q) Grove v. Elliott, 2 Vent. 44.

(r) Carth. 485; Salk. 412; 12 Co. 73; 2 Vent. 43; 1 P. Wms. 32.

ters, have uniformly been enacted or confirmed by parliament. The several acts of uniformity are instances which may be mentioned. Although those matters were first considered in convocation, yet that body was only regarded as an assembly of learned men, able and proper to prepare and propound such regulations, but not to enact and give them force.(s)

The convocation for the province of Canterbury, which was held in London in the year 1603, in the first year of the reign of King James I., by the king's writ had a license under the great seal to agree to such canons as they should think fit; whereupon they made several canons concerning the government of the church, religion, the clergy, &c., which had the royal assent.(t)

Questions have been raised how far the laity were bound by these canons, which were never confirmed by parliament, although the clergy are clearly bound by them.(u)

In *Middleton v. Crofts*,(x) the judges were all of opinion that the canons of 1603,(y) not having been confirmed by parliament, do not *proprio vigore*, by their own force and authority, bind the laity; but there are some provisions contained in those canons which are declaratory of the ancient usage and law of the church of England, received and allowed here, \*which in that respect, and by virtue [ \*25 ] of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, that body of canons. No ecclesiastical person can dispense with a canon, for they are obliged to pursue the directions in them with the utmost exactness, and it is in the power of the crown only to do it.(z)

(s) *Middleton v. Crofts*, 2 Atk. 657; Str. 1056. It was resolved in parliament, 15th December, 1640, that the clergy of England convened in any convocation or synod, or otherwise, have no power to make any constitutions, canons, or acts whatever in matter of doctrine, discipline, or otherwise, to bind the clergy or laity of the land, without common consent of parliament. It was also resolved that the canons of 1640 do not bind the clergy or laity of this land, or either of them.—3 Rushworth, 1365; see ib. 1187; 4 ib. 112.

(t) See Gibb. Cod. 993.

(u) *Priesley v. Lamb*, 6 Vca. 423. See 3 Phill. R. 268.

(x) 2 Atk. 653; Str. 1056. See 6 Mod. 190; 2 Barnard. B. R. 353.

(y) It should seem that the canons of 1603 were originally framed in Latin, and the English translation is in some parts not by any means accurate. The original text should be always consulted in any case of apparent ambiguity.—2 Addams Rep. 189, n.

(z) *More v. More*, 2 Atk. 158.



## OF MARRIAGES NOT WITHIN THE GENERAL MARRIAGE ACTS.

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## SECT. 1.—OF MARRIAGES IN ENGLAND BEFORE THE FIRST MARRIAGE ACT.

*Marriage Contracts.*—The legal validity of marriages, previous to the first marriage act,(a) depended upon the doctrine of the ecclesiastical courts. Matrimonial contracts or spousals were divided into contracts *per verba de futuro*, and contracts *per verba de presenti*; and contracts of the former description, when followed by carnal intercourse, were commonly considered equivalent in legal effect to contracts *per verba de presenti*.(b) A contract *per verba de presenti* though not attended by consummation, was sufficient to avoid a second marriage, though followed by consummation.(c)

Espousals are thus defined by Swinburne:—*Sponsalia sunt mutua repromissio futurarum nuptiarum, rite, inter eos, quibus jure licet, facta.* Spousals are a mutual promise of future marriage, being duly made between those persons, to whom it is lawful. From which it appears, 1st, that this promise must be mutual; 2dly, that it must be made rite or duly; 3dly, that it must be entered into by those who may lawfully marry.(d) These contracts were either *de futuro* or *de presenti*.

[ \*27 ] The former a mutual promise of marriage to be had afterwards, \*as when a man said to the woman, "I will take thee to my wife," and she answered, "I will take thee to my husband." Spousals *de presenti* were a mutual promise of *present* matrimony, as when the man said to the woman, "I do take thee to my wife," who then answered, "I do take thee to my husband.(e)

By the early law, until the council of Trent passed its decree for the reformation of marriage, the consent of two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name *sponsalia per verba de presenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonies of marriage. The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly to mere engagements for a *future marriage*, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not known to the Roman civil law.(f)

(a) 26 Geo. 2, c. 33.

(c) 2 Hagg. Cons. Rep. 66.

(c) *Bunting v. Lepingwell*, 4 Co. R. 29.(d) *Swinburne on Spousals*, 5.(e) *Swinburne on Spousals*, 8; 2 Hagg. Cons. R. 66, 82, 87.(f) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 62—65.

*Regular and irregular Marriages.*—Different rules, relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages—of irregular marriages—and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated, both in substance and in ceremony. In the irregular marriage every thing was presumed to be complete and consummated in substance, but not in ceremony; and the ceremony was enjoined to be undergone as matter of order. In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual consent would release the parties from their engagement: and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of \*present consent at the time of the inter- [ \*28 ] course, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. In proceedings under the canon law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shown to be disabled by original infirmity of body. In the case of a marriage *per verba de presenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might never take place. It was defeasible in various ways; and therefore consummation was not to be presumed: it must either have been proved or admitted. Till that was done the relation of husband and wife was not contracted; it must be a promise *cum copulâ*, that implied a present acceptance and created a valid contract founded upon it.(g)

Previously to the first marriage act, when a contract of marriage was proved, the ecclesiastical court would compel the party to solemnize the marriage in the church.(h)

† The marriage acts(i) enact, that in no case whatever shall any suit or proceedings be had in any Ecclesiastical court, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de presenti* or *per verba de futuro*. By 58 Geo. 3, c. 81, s. 3, it is provided, that there shall be no proceeding in any ecclesiastical court in Ireland to compel a celebration of a marriage *in facie ecclesiæ*, by reason of any contract. The first marriage act, 26 Geo. 2, c. 33, swept away the whole subject of irregular marriages in England, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.(k)

(g) *Dalrymple v. Dalrymple*, 2 Hagg. 82.

Cons. R. 65—67; Dodson, 14—16.

(i) 26 Geo. 2, c. 33, s. 13; 4 Geo. 4, c. 76,

(h) *Baxter v. Buckley*, 1 Lee's R. 42; s. 27.

Oughton, tit. 209, et seq.; 2 Hagg. Cons. R.

(k) 2 Hagg. Cons. R. 70.

[ \*29 ] \*The validity, however, of marriages in Ireland, and in some of the British colonies, is still decided according to the laws of this country as they existed before the marriage act: it will be proper therefore to devote a few pages to the consideration of that subject.

*Ancient Mode of Solemnization.*—Solemnization of marriage was not used in the church before the ordinance of Pope Innocent the Third, who filled the papal chair from 1198 to 1216, before which the man came to the house where the woman inhabited, and carried her with him to his house, and this was all the ceremony.<sup>(l)</sup> It is said that a marriage by a priest, in a place which is not a church or chapel, and without any solemnity of the celebration of mass, was a good marriage.<sup>(m)</sup> But in *Foxcroft's case*,<sup>(n)</sup> where a man, infirm in bed, was privately married to a woman *enceinte* by him, by the Bishop of London, without the celebration of any mass, the marriage was held void, and a son born within twelve weeks after the marriage was adjudged to be a bastard. Marriages were formerly performed in a great many houses within the liberty of the Fleet, and were valid.<sup>(o)</sup>

*Directions in the Rubric.*—The Rubric, which is that part of the Book of Common Prayer which contains directions for the performance of the different offices of religion, is clearly of binding obligation and authority, having been confirmed by acts of parliament. Anciently, and before the Reformation, various liturgies were used in this country; and it should seem as if each bishop might, in his own particular diocese, direct the form in which the public service was to be performed; but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of Uniformity passed, which established a particular liturgy to be used throughout the kingdom.<sup>(p)</sup> King James the First made some alteration in the liturgy. Immediately upon the Restoration the Book of Common

[ \*30 ] Prayer was revised. An attempt was then made to render it \*satisfactory both to the church itself and to those who dissented from the church, particularly to the Presbyterians; and for that purpose conferences were held at the Savoy; but the other party requiring an entire new liturgy on an entire new plan, the conference broke up without success. The liturgy was then revised by the two houses of convocation; it was approved by the king; it was presented to the parliament, and an act passed confirming it,<sup>(q)</sup> being the last act upon the subject; and so it stands confirmed to this day, except so far as any alteration may have been produced by the toleration act, or by any subsequent statutes.<sup>(r)</sup> By the act of toleration<sup>(s)</sup> it was declared, that no person taking the prescribed oaths should be prosecuted for non-conformity to the Church of England. A question seems to have been raised, whether this act authorized the marriage of dissenters in their own congregation, after the publication of banns,

(l) *Bunting's case*, Moore, 170; Vin. Abr. Marriage (F). Of the marriage rites observed in the ancient church, see Bingham's *Antiquities of the Christian Church*, book 22, vol. 7, 8vo. ed. 1829, pp. 203—277.

(m) Roll. Abr. 341, pl. 21; Vin. Abr. Baron, and Feme (A), pl. 21.

(n) Vin. Abr. *Bastard* (B), pl. 18.

(o) 2 Lee's R. 548; 35; Burn's Fleet Reg.

(p) See stat. 1 Eliz. c. 2; 1 Hagg. Cons. R. 177.

(q) 13 & 14 Charles 2, c. 4.

(r) See *Kemp v. Wickes*, 3 Phill. R. 267—269.

(s) 1 W. & M. c. 18.

published according to the discipline of their own congregation. The married parties were libelled in the ecclesiastical court for fornication. A prohibition was granted, in order that the question of law might be tried, but it does not appear what ultimately became of the case.(t)

Marriages are by the Rubric enjoined to be solemnized by a minister; there is to be a previous publication of banns, and other ceremonies to be observed: the laws of the church(u) and the state, by several acts of parliament, prohibited marriage to be performed in any other way; it punished the parties concerned in clandestine marriages, both the minister who solemnized them, and the parties between whom they were solemnized.(v) But notwithstanding all these laws enjoining how a marriage was to be solemnized, and punishing those who solemnized it in any other way, a marriage in a private house between minors was a perfectly valid marriage (notwithstanding it was an irregular, and so far an unlawful marriage) till the marriage act 26 Geo. 2, 33, by direct and positive terms, expressly declared that such a marriage should be null and void to all [ \*31 ] intents and purposes.(w) Parties in England, who were desirous of being married clandestinely anterior to that act, were seldom put to any difficulty for lack of a minister, in spite of the penalties and forfeitures.(x) So before the 26 Geo. 2, c. 33, a marriage in a church was as valid without banns or license as with, for although they were requisites fit and proper to be complied with, yet they were not necessary to the validity of the marriage.(y)

The marriages which, during the Commonwealth, were celebrated by justices of the peace, were deemed by the legislature to be invalid; and on the restoration of Charles the Second, an act was passed for the purpose of giving them validity.(z)

Throughout the whole of Christendom there was no religious ceremony connected with marriage, till the time of the Council of Trent; and still in the countries which did not acknowledge the authority of that council, no religious ceremony was essential to marriage, and none was essential in this country till the passing of the first marriage act, 26 Geo. 2, c. 33.

It was held by Holt, C. J.(a) that a contract *per verba de presenti*, amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement; for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ*,

(t) *Hutchinson and wife v. Brookbanke*, 3 Lev. 376.

(u) Canon 62.

(v) 6 & 7 Will. 3, c. 6; 7 and 8 Will. 3, c. 35; 10 Ann. c. 19.

(w) 3 Phill. R. 286, 287.

(x) 1 Addams R. 73.

(y) *Wright v. Elwood*, 1 Curteis, 53; Bac. Abr. Marriage (C.)

(z) Gibs. Cod. 521; State Trials, vol. 20, 551, 8vo. ed. By statute 12 Car. 2, c. 33, (confirmed by 13 Car. 2, c. 11,) after reciting that, by virtue or colour of certain ordinances, or pretended acts or ordinances, divers marriages, since the beginning of the late troubles, had been had and solemnized in some

other manner than had been formerly used; it was enacted that all marriages had and solemnized in any of his majesty's dominions since the 1st May, 1642, before any justice of the peace, or reputed justice of the peace, and all marriages within &c., since the same day had, &c., according to the direction of any act or ordinance of one or both Houses of Parliament, or of any convention at Westminster, under the style or title of a Parliament, should be as valid as if they had been solemnized according to the rites and ceremonies of the Church of England.

(a) *Collins v. Jesson*, 2 Salk. 431; 6 Mod. 155; *Widmore's case*, 2 Salk. 438.

with this difference, that if they cohabited before marriage *in facie* [ \*32 ] *ecclesiæ*, they were for \*that punishable by ecclesiastical censures; and if, after such contract, either of them lay with another, they would punish such offender as an adulterer. But a contract *per verba de futuro*, which did not intimate an actual marriage, but referred to a future act, might be released.

In *Wigmore's case* (a) the wife sued in the Spiritual Court for alimony; the husband was an anabaptist, and having obtained a license from the bishop to marry, was married according to the forms of their own religion. Holt, C. J. said, by the canon law a contract *per verba de presenti* is a marriage, as if I take you to be my wife, so it is of a contract *per verba de futuro*, viz. I will take, &c. If the contract be executed, and he does take her, it is a marriage, and the ecclesiastical court cannot punish for fornication.

In *Weld v. Chamberlayne*, (b) on an issue of marriage or no marriage, it appeared that the marriage was before a man who, having been in orders, had been ejected, but no ring was used according to the Common Prayer Book. Pemberton, C. J. inclined to think it a good marriage, there being words of contract *de presenti* repeated after a parson in orders. (c) Lord Kenyon said, on a question as to a Fleet marriage, "I think, though I do not speak meaning to be bound, that an agreement between the parties *per verba de presenti*, was *ipsum matrimonium*." (d)

*Celebration by a Roman Catholic Priest.*—In *Rex v. Fielding*, (e) a marriage was in England by a Roman Catholic priest in the year 1705, before the marriage act, and upon evidence that the prisoner, in answer to the question, whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband: Powell, J., upon a trial for bigamy, considered it as a marriage *per verba de presenti*. Where the first marriage, which was with a Roman Catholic woman, was by a Romish priest, in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witness not under-

[ \*33 ] standing, could not swear even that the \*ceremony of marriage according to the Church of Rome was read, the defendant, on an indictment for bigamy, was directed to be acquitted. But Lord C. J. Willes, who tried the prisoner, seemed to be of opinion that a marriage by a priest of the Church of Rome was a good marriage, could the ceremony according to that church be proved, namely, the words of the contracting part of it. (f) A marriage properly celebrated abroad, by a popish priest, after the Roman ritual, would be deemed a good marriage here: for by the law of England, marriages are to be deemed good or bad, according to the laws of the place where they are made. It has been determined at common law, that if a man marries two wives, the first in France and another here, he may be tried and indicted here for that as a

(a) 1 Salk. 438.

(b) 2 Show. 300.

(c) See *Poulter v. Cornwell*, Salk. 9.

(d) *Rood v. Passer*, *Peake's Cases*, 232.

(e) 14 Howell's St. Tr. 1327.

(f) *Lyon's case*, O. B. Dec. 1738, Serjt Forster's MS.; 1 East, P. C. 469.

felony; therefore a marriage in France is deemed a good marriage, though not agreeable to our law; for in matrimonial causes, all laws take notice of the law of other countries.(g) By the municipal laws of this country, before the first marriage act, a clandestine marriage by a popish priest, after the English ritual, was not void, though irregular, and the priest and the parties marrying and present at it might be liable to punishment for a breach of the law.(h) A Roman Catholic priest is so far acknowledged by our church as a person in holy orders, that if he renounce the errors of the Church of Rome, he is a priest without any new ordination, and would be recognised by our church as a person capable of officiating as a priest.(i) It must, however, be remembered, that after the 26 Geo. 2, c. 33, and previously to the 6 & 7 Will. 4, c. 85, Roman Catholics and dissenters marrying in England, were obliged to conform to the ceremonies of the Church of England, for the former act contained no exception in their favour.(j)

*Doctrine of Ecclesiastical Courts as to Contracts of Marriage.*—A mere contract *per verba de præsenti* was a perfect contract of marriage, according to the doctrine of the ecclesiastical\* [ \*34 ] courts. Thus where there were three engagements in [ \*34 ] writing, the first, dated June 23, 1724, and contained these words, "We swear we will marry one another;" the second, dated July 11, 1724, was to this effect, "I take you for my wife, and swear never to marry any other woman;" this last contract was repeated in December in the same year. And although it was contended that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it, the court, composed of a full commission, paid no regard to the objection, and found for the marriage; and an application for a commission of review, founded upon new matter alleged, was refused by the Lord Chancellor.(k)

In a case relative to the validity of a marriage celebrated abroad, which occurred shortly before the marriage act, the marriage in question had been solemnized by a Roman Catholic priest, according to the Roman ritual; it was doubted whether this species of marriage would have been good if it had taken place in England. Sir E. Simpson said,(l) "There may be other instances, but I have not met with any but that of *Arthur v. Arthur*,(m) where a marriage by a popish priest, by the Roman ritual, has been pronounced for: but that was a marriage in Ireland between parties both Catholics, where the laws with respect to papists are different; which laws, as the laws of the country in which the contract was made, the court would respect. And in that case there was consummation, that purified any condition in the contract. There can be no doubt but that a marriage here by him who is in allowed orders, according to the English

(g) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. R. 402; see Kelyng, 79; 1 Sid. 171.

(h) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. R. 404. See *ibid.* 446.

(i) *Rex v. Brampton*, 10 East, 284, 288.

(j) See 1 Hagg. Cons. R. Appendix, 8; stat. 31 Geo. 3, c. 32.

(k) Case of Lord Fitzmaurice, Cor. Det. 1732, cited by Lord Stowell in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 69, 100; Dodson, 18; 1 Lee's R. 28.

(l) *Scrimshire v. Scrimshire*, 2 Hagg. 395. 401, 402.

(m) 1 Lee's R. 29.

with this difference, that if they cohabited before marriage *in facie* [ \*32 ] *ecclesiæ*, they were for \*that punishable by ecclesiastical censures; and if, after such contract, either of them lay with another, they would punish such offender as an adulterer. But a contract *per verba de futuro*, which did not intimate an actual marriage, but referred to a future act, might be released.

In *Wigmore's case* (a) the wife sued in the Spiritual Court for alimony; the husband was an anabaptist, and having obtained a license from the bishop to marry, was married according to the forms of their own religion. Holt, C. J. said, by the canon law a contract *per verba de presenti* is a marriage, as if I take you to be my wife, so it is of a contract *per verba de futuro*, viz. I will take, &c. If the contract be executed, and he does take her, it is a marriage, and the ecclesiastical court cannot punish for fornication.

In *Weld v. Chamberlayne*, (b) on an issue of marriage or no marriage, it appeared that the marriage was before a man who, having been in orders, had been ejected, but no ring was used according to the Common Prayer Book. Pemberton, C. J. inclined to think it a good marriage, there being words of contract *de presenti* repeated after a parson in orders. (c) Lord Kenyon said, on a question as to a Fleet marriage, "I think, though I do not speak meaning to be bound, that an agreement between the parties *per verba de presenti*, was *ipsum matrimonium*." (d)

*Celebration by a Roman Catholic Priest.*—In *Rex v. Fielding*, (e) a marriage was in England by a Roman Catholic priest in the year 1705, before the marriage act, and upon evidence that the prisoner, in answer to the question, whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband: Powell, J., upon a trial for bigamy, considered it as a marriage *per verba de presenti*. Where the first marriage, which was with a Roman Catholic woman, was by a Romish priest, in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witness not under-

[ \*33 ] standing, could not swear even that the \*ceremony of marriage according to the Church of Rome was read, the defendant, on an indictment for bigamy, was directed to be acquitted. But Lord C. J. Willes, who tried the prisoner, seemed to be of opinion that a marriage by a priest of the Church of Rome was a good marriage, could the ceremony according to that church be proved, namely, the words of the contracting part of it. (f) A marriage properly celebrated abroad, by a popish priest, after the Roman ritual, would be deemed a good marriage here: for by the law of England, marriages are to be deemed good or bad, according to the laws of the place where they are made. It has been determined at common law, that if a man marries two wives, the first in France and another here, he may be tried and indicted here for that as a

(a) 1 Salk. 438.

(b) 2 Show. 300.

(c) See *Poulter v. Cornwell*, Salk. 9.

(d) *Reed v. Passer*, *Ponke's Cases*, 232.

(e) 14 Howell's St. Tr. 1327.

(f) *Lyon's case*, O. B. Dec. 1738, Serjt Forster's MS.; 1 East, P. C. 469.

felony; therefore a marriage in France is deemed a good marriage, though not agreeable to our law; for in matrimonial causes, all laws take notice of the law of other countries.(g) By the municipal laws of this country, before the first marriage act, a clandestine marriage by a popish priest, after the English ritual, was not void, though irregular, and the priest and the parties marrying and present at it might be liable to punishment for a breach of the law.(h) A Roman Catholic priest is so far acknowledged by our church as a person in holy orders, that if he renounce the errors of the Church of Rome, he is a priest without any new ordination, and would be recognised by our church as a person capable of officiating as a priest.(i) It must, however, be remembered, that after the 26 Geo. 2, c. 33, and previously to the 6 & 7 Will. 4, c. 55, Roman Catholics and dissenters marrying in England, were obliged to conform to the ceremonies of the Church of England, for the former act contained no exception in their favour.(j)

*Doctrine of Ecclesiastical Courts as to Contracts of Marriage.*—A mere contract *per verba de presenti* was a perfect contract of marriage, according to the doctrine of the ecclesiastical<sup>a</sup> [ \*34 ] courts. Thus where there were three engagements in writing, the first, dated June 23, 1724, and contained these words, "We swear we will marry one another;" the second, dated July 11, 1724, was to this effect, "I take you for my wife, and swear never to marry any other woman;" this last contract was repeated in December in the same year. And although it was contended that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it, the court, composed of a full commission, paid no regard to the objection, and found for the marriage; and an application for a commission of review, founded upon new matter alleged, was refused by the Lord Chancellor.(k)

In a case relative to the validity of a marriage celebrated abroad, which occurred shortly before the marriage act, the marriage in question had been solemnized by a Roman Catholic priest, according to the Roman ritual; it was doubted whether this species of marriage would have been good if it had taken place in England. Sir E. Simpson said,(l) "There may be other instances, but I have not met with any but that of *Arthur v. Arthur*,(m) where a marriage by a popish priest, by the Roman ritual, has been pronounced for: but that was a marriage in Ireland between parties both Catholics, where the laws with respect to papists are different; which laws, as the laws of the country in which the contract was made, the court would respect. And in that case there was consummation, that purified any condition in the contract. There can be no doubt but that a marriage here by him who is in allowed orders, according to the English

(g) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. R. 402; see Kelyng, 79; 1 Sid. 171.

(h) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. R. 404. See *ibid.* 446.

(i) *Rex v. Brampton*, 10 East, 284, 288.

(j) See 1 Hagg. Cons. R. Appendix, 8; stat. 31 Geo. 3, c. 32.

(k) Case of *Lord Fitzmaurice*, Cor. Deb. 1732, cited by Lord Stowell in *Delrymple v. Delrymple*, 2 Hagg. Cons. R. 69, 100; *Delrymple v. Delrymple*, 18; 1 Lee's R. 28.

(l) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. R. 401, 402.

(m) 1 Lee's R. 29.



riage act a contract of marriage *per verba de præsenti* would have bound the parties. So upon the trial of an issue out of the Court of Chancery, on the legitimacy of a person born before the marriage act, the Lord Chief Justice of the King's Bench is said to have ruled, that at that period a contract of matrimony *per verba de præsenti* constituted a legal marriage. On a motion for a new trial, the question was elaborately argued before the Lord Chancellor, but did not ultimately call for a decision.(v)

A learned writer(x) has adduced various authorities to establish the proposition, that according to the law administered in England before [ \*38 ] the marriage act, a matrimonial contract *de præsenti* was essentially distinct from a marriage solemnized by a person in holy orders; that it did not confer on the woman the right to dower, on the man the right to the woman's property, or on the issue the rights of legitimacy; and that it did not render a subsequent marriage with a third person *ipso facto* void at law, though it formed a ground for a sentence annulling it. They seem also to show, that, according to the ecclesiastical law, the contract did not give any right, except to call for a performance of it by actual solemnization, not justifying cohabitation, and not conferring conjugal rights; and that at the common law it had no effect, though in cases where the parties cohabited, and were reputed to be man and wife, this might be sufficient evidence for the purposes of some actions in which strict proof was not required."

Several statutes relating to the subject of marriage are cited for the purpose of showing that the distinction between perfect marriages and mere contracts has uniformly prevailed.(y)

The early acts of the legislatures of the British colonies afford proof of the prevalence of the opinion, that the marriage must be celebrated by a minister.(z)

## SECT. 2.—OF MARRIAGES OF THE ROYAL FAMILY.

The stat. 28 Hen. 8, c. 18,(a) made it high treason for any man to marry any of the king's children, lawfully born, or commonly reputed for his children, or any of the king's sisters or aunts of the part of the father, or any of the lawful children of the king's brethren or sisters, or to contract matrimony with any of them, without the king's license first had under the great seal; and the woman so offending incurred

(v) *Beer v. Ward*, 2 Roper's Husband and Wife, Addenda by Jacob, 446. (Littell's Law Library, Ap. 1841.)

(x) 2 Roper on Husband and Wife, Addenda by Jacob, 445-474. (Littell's Law Library, Ap. 1841.)

(y) 25 Hen. 8, c. 21, transferring the power of granting licenses to the Archbishop of Canterbury, 32 Hen. 8, c. 35, Pre-contracts;

12 Car. 2, c. 33; ante, p. 31, n. (x); 6 & 7 Will. 3, c. 6; 7 & 8 Will. 3, c. 35; 57 Geo. 3, c. 51; 5 Geo. 4, c. 68; post, p. 48; Irish statute 11 Geo. 2, c. 10, s. 3; 19 Geo. 2, c. 13; 21 & 22 Geo. 3, c. 25; post, sec. 6.

(z) See 1 Burge on Foreign Law, 161-168; post, sec. 3.

(a) Repealed by general words of stat. 1 Edw. 6, c. 12; 1 Mary, st. 1, c. 1.

the same offence. It has been inferred from the restraint imposed by this act, that such marriages were previously lawful.(b)

By the 9th sect. of the stat. 1 Will. 4, c. 2, providing for [ \*39 ] \*the administration of the government, in case the crown should descend to her present majesty under the age of 18 years, it was enacted, that it should not be lawful for the king or queen of this realm, for whom a regent was thereby appointed, to intermarry, before his or her age of eighteen years, with any person whomsoever, without the consent in writing of the regent; and every marriage so had without such consent should be void: and every person acting or concerned in procuring such marriage, and the person who should be so married to such king or queen under the age of 18 years, should be guilty of high treason. By the 4th section of stat. 3 & 4 Vict. c. 52, to provide for the administration of the government, in case the crown shall descend to any issue of her majesty, whilst such issue shall be under the age of eighteen years, and for the care and guardianship of such issue, it is provided, that it shall not be lawful for any king or queen of this realm, for whom a regent is thereby appointed, to intermarry before his or her age of eighteen years, with any person whomsoever, without the consent in writing of the regent and the assent of both houses of parliament previously obtained; and every marriage without such consent and such assent of the two houses of parliament, shall be null and void to all intents and purposes; and every person who shall be acting, aiding, abetting, or concerned in obtaining, procuring or bringing about any such marriage, and the person who shall be so married to such king or queen under the age of eighteen years, shall be guilty of high treason, and suffer and forfeit as in cases of high treason.

It is laid down by Sir E. Coke,(c) that no man may marry the queen dowager without the king's license, on pain of forfeiting his lands and goods. But his learned annotators state that they have searched in vain for the parliamentary roll cited as an authority for this position. It is neither amongst the printed statutes at large, nor amongst the Rolls of Parliament lately published. Yet it is taken notice of as a statute in the abridgment of parliamentary records.(d) But we cannot find any such statute in print. It is not meant by this to doubt the existence of such a statute, we only apprise the reader of the inaccuracy in reference to it.(e) The queen dowager does not lose her regal dignity by marrying a subject.(f)

*Royal Marriage Act.*—Marriages of any of the royal family are excepted from the marriage acts.(g) By stat. 12 Geo. 3, c. 11, s. 1, it is enacted "that no descendant of the body of King George the Second, male or female (other than the issue of princesses, who have married, or may hereafter marry, into foreign families,) shall be capable of contracting matrimony without the previous consent of his majesty, his heirs or successors, signified under the great seal, and

(b). Fortescue R. 407.

(c) Co. Litt. 133 b; Rot. Parl., 8 Hen. 6, num. 7; 1 Bl. Comm. 223. 226.

(d) Cotton's Rec. 589. See 2 Inst. 18; Fortescue, 418; Riley's Plac. Parl. 672.

(e) Harg. Co. Litt. 133 b. note. Owen

Tudor married the widow of Henry 6, which was the reason of the law.—Fortescue, 429; 5 Rapin's Hist. p. 326, 8vo. ed. 1728.

(f) 1 Bl. Comm. 223; 2 Inst. 50.

(g) 26 Geo. 2, c. 33, s. 17; 4 Geo. 4, c. 76, s. 30; 6 & 7 Will. 4, c. 85, s. 45.

declared in council (which consent to preserve the memory thereof is hereby directed to be set out in the license and register of marriage, [ \*40 ] and to be entered in the books of the privy council,) \*and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever."

By the second section it is provided " that in case any such descendant, being above the age of 25 years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the king, his heirs or successors, that then such descendant, upon giving notice to the king's privy council, which notice is hereby directed to be entered in the books thereof, may at any time from the expiration of twelve calendar months after such notice given to the privy council as aforesaid, contract such marriage; and his or her marriage with the person before proposed and rejected may be duly solemnized without the previous consent of his majesty, his heirs or successors; and such marriage shall be good, as if this act had never been made, unless both houses of parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage."

The third section enacts, " that every person who shall knowingly or wilfully presume to solemnize, or to assist or to be present at the celebration of any marriage, with any such descendant, or at his or her making any matrimonial contract without such consent as aforesaid first had and obtained, except in the case above mentioned, shall being duly convicted thereof, incur and suffer the pains and penalties ordained and provided by the statute of provision and premunire, made in the sixteenth year of the reign of Richard the Second."

The royal marriage act was opposed with extraordinary vigour in both houses. New motions were continually made, either to expunge or to amend those that were thought to be its most exceptionable parts; and every degree of parliamentary skill was used, either to obstruct its progress, or to improve its form. Notwithstanding these impediments, it was carried through the House of Lords with wonderful dispatch: and though it was brought in late in February, passed through the last reading on the 3d March.(g) Amongst other reasons assigned in the lords' protest against this bill was, that it provided [ \*41 ] no remedy at any age against the improvident \*marriage of the king reigning, the marriage of all others the most important to the public. It provided nothing against the indiscreet marriage of a prince of the blood, being regent at the age of 21, nor furnished any remedy against his permitting such marriages to others of the blood royal, the regal power fully vesting in him as to this purpose, and without the assistance of his council. And another protest was, that the bill was essentially wanting to its avowed purpose, in having provided no guard against the greater evil, the improper marriages of the princes on the throne.(h) In the course of its progress, one of the first measures that was taken was to demand the opinion of the judges, how far, by the law of this kingdom, the king is entrusted with the care and approbation of the marriages of the royal

(g) *Annual Reg.* 15 vol. p. 91\*.

(h) *Lords' Journ.* 3d March 1772, vol. 33, pp. 278, 279.

family. The following opinion was given by the judges present: "We are all of opinion that the care and approbation of the marriages of the king's children and grandchildren, and of the presumptive heir to the crown (other than the issue of princesses married into foreign families,) do belong to the kings of this realm; but to what other branches of the royal family such care and approbation extend, we do not find precisely determined."<sup>(i)</sup>

It is observed by Mr. Burge<sup>(k)</sup> that this act does not, like the marriage act, in express terms restrain, nor can it, from the nature of its provisions, be construed to restrain its operation to a matrimonial contract which has been made in England. The conditions which it enjoins admit of a performance in whatever place the marriage is celebrated. The judicial tribunals of England must necessarily be bound by this statute, and \*could not recognize a marriage contracted in contravention of its provisions. And [ \*42 ] if this act be considered as affecting those who are the objects of legislation by the British parliament, and without regard to the relation in which the descendants of George the Second stand to the kingdom of Hanover, foreign tribunals would not, consistently with the principles on which the *comitas gentium* is adopted, treat it as valid.<sup>(l)</sup>

*Marriage of His Royal Highness the Duke of Sussex.*—At the close of the year 1792, his Royal Highness the Duke of Sussex became acquainted, at Rome, with Lady Augusta Murray, daughter of the Earl of Dunmore, previously wholly unknown to him. An attachment sprung up between them, and after a few months they intermarried.

The marriage ceremony was performed by a minister of the Church of England, according to the liturgy of that church; and it was also preceded by a written formal contract of marriage, signed by both parties, almost *per verba de presenti* in the nature of espousals.<sup>(m)</sup>

(i) 17 vol. Parl. Hist. 387. See the opinion of the judges in the reign of George I., when they were consulted on the prerogative claimed by the king over his grandchildren. Ten of the judges certified their opinion, that the education and care of the persons of the king's grandchildren then in England, and of the eldest son of the Prince of Wales, when his majesty should think fit to cause him to come into England, and the ordering the place of their abode, and appointing their governors and governesses, and other instructors, attendants, and servants, and the care and approbation of their marriages when grown up, did belong of right to the king of this realm. Two of the judges were of opinion, that although the care and approbation of the marriages of the king's grandchildren belonged to the king, yet that it was not exclusive of their father; and that the father had in all cases a right to the custody and education of his children. —Fortescue, 401—440; 15 Howell's St. Trials, 1300—1330. See 1 Bl. Com. 225, 226.

(k) 1 Comm. on Foreign Law, 198.

(l) 1 Burge on Foreign Law, 198.

(m) The contract was in the words following:—"On my knees, before God our Creator, I, Augustus Frederick, promise thee Augusta Murray, and swear upon the Bible, as I hope for salvation in the world to come, that I will take thee, Augusta Murray, for my wife, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish till death do us part: to love but thee only, and none other, and may God forget me if I ever forget thee. The Lord's name be praised; so bless me; so bless us, O God; and with my handwriting do I, Augustus Frederick, this sign, March 21st, 1793, at Rome, and put my seal to it and my name. (Signed.)

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A similar engagement, in the handwriting of Lady Augusta, and signed by her, was subjoined at the foot of the above paper.—Papers elucidating the claims of Sir Augustus D'Este, pp. 4—7.

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On the return of the royal couple to England, they were married again by banns in the parish church of St. George, Hanover Square. The second marriage having attracted the attention of George the Third, his majesty, acting by his procurator general, caused a suit to be instituted for the purpose of obtaining a sentence declaratory of the marriage *de facto* of his Royal Highness with Lady Augusta Murray, as had in violation of the royal marriage act. The sentence declared that there was no sufficient proof by witnesses of the marriage at Rome, but that if any such marriage, or rather show or [ \*43 ] effigy of a marriage, was in fact had \*or solemnized, at the said city of Rome, between the said parties, the said pretended marriage was and is absolutely null and void to all intents and purposes in law whatsoever.(n)

### SECT. 3.—OF MARRIAGES IN THE BRITISH COLONIES.

THE law of marriage in the British colonies is either that which prevailed in England previously to the passing of the first marriage act in 1753,(a) or such as has been established by their own municipal law; for that act, as well as the present marriage acts,(b) are confined to England and Wales. Thus we have already seen that a marriage between two British subjects, celebrated at Madras by a Roman Catholic priest in a private room, was held to be valid.(c)

*East Indies.*—Members of the church of Scotland, resident in the East Indies, had usually been married by ministers of their own church. But Presbyterian ministers not receiving episcopal ordination, are not, according to the English law, deemed to be in holy orders; and it had been held, that natives of Scotland, resident in India, were to be considered as having an English domicil.(d) It therefore became doubtful whether these marriages were not to be governed by the English law, according to which they would have stood upon the same footing as contracts *de præsenti* before the first marriage act.(e)

*Solemnization of Marriages in India by Ministers of the Church of Scotland.*—The stat. 58 Geo. 3, c. 84, after reciting, \*that [ \*44 ] doubts had arisen concerning the validity of marriages which have been had and solemnized within the British territories in

(n) *Heseltine v. Lady Augusta Murray*, 14th July, 1794, 2 Addams R. 400, 401 n. Two learned counsel are stated to have been of opinion, after great consideration, that the royal marriage act does not extend to any marriages by any descendants of George 2, contracted and solemnized *bona fide* out of Great Britain and beyond the limits of British jurisdiction, and that the marriage of his royal highness the Duke of Sussex at Rome, was not a marriage impeachable under that statute. See the opinion of Stephen Lushington and Griffith Richards, dated Doctors' Commons, 13th July, 1831.

This opinion will be found in the case of

the children of his royal highness the Duke of Sussex, elucidated, a Juridical Exercitation by Sir John Dillon, Knt., 1832.—See Papers elucidating the Claims of Sir Augustus D'Este, 1831, Law Magazine, vol. 7, pp. 176, 432.

(a) 26 Geo. 2, c. 33.

(b) 4 Geo. 4, c. 76; 6 & 7 Will. 4, c. 85.

(c) *Lautour v. Teesdale*, 8 Taunt. 830; 2 Marsh. 243; ante, p. 36, 37.

(d) *Bruce v. Bruce*, 6 Br. P. C. 566, 2nd ed.

(e) See 2 Roper on Husband and Wife, by Jacob, 459, 460.

India, by ordained ministers of the church of Scotland, as by law established, and that it was expedient that such doubts should be quieted, and that the law respecting such marriages should be declared for the future, declared and enacted, "that all marriages heretofore had and solemnized, or which shall be had and solemnized within the said territories in India, before the 31st day of December now next ensuing (1818,) by ordained ministers of the church of Scotland, as by law established, shall be and shall be adjudged, esteemed, and taken to have been and to be of the same and no other force and effect as if such marriages had been had and solemnized by clergymen of the Church of England, according to the rites and ceremonies of the Church of England; and that from and after the said thirty-first day of December now next ensuing, all marriages between persons, both or one of such persons being members or member of or holding communion with the church of Scotland, and making a declaration to the effect hereinafter mentioned, which marriages shall be had and solemnized within the British territories in India, by ordained ministers of the church of Scotland as by law established, and appointed by the United Company of Merchants of England trading to the East Indies, to officiate as chaplains within the said territories, shall be and shall be adjudged, esteemed, and taken to be of the same and no other force and effect as if such marriage were had and solemnized by clergymen of the church of England, according to the rites and ceremonies of the church of England: provided always, that from and after the said thirty-first day of December, no such marriage as aforesaid shall be had and solemnized till both or one of such persons, as the case may be, shall have signed a declaration in writing, in duplicate, stating that they, or he, or she, as the case may be, are or is members or member of or holding communion with the church of Scotland, by law established."

*Delivery and Transmission of Certificate of Marriage by Minister.*—By the second section it is enacted, "that the minister by whom such marriage shall be solemnized, shall, immediately upon the solemnization thereof, certify such marriage \*by a writing under [ \*45 ] his hand in duplicate, subjoined to or indorsed upon the declaration in duplicate hereinbefore mentioned, specifying in such certificate the names and descriptions of the parties between whom, and of the witnesses in whose presence the said marriage has been had and solemnized, and the time and place of the celebration of the same; and such certificate in duplicate shall be also signed forthwith by the parties entering into such marriage, and by the witnesses to the same; and the minister officiating shall deliver one duplicate of such declaration and certificate to the persons married, or to one of them, and shall transmit the other duplicate of such declaration and certificate to the chief secretary of government at the presidency within which such marriage shall have been had and solemnized."

*British Guiana, the Cape and Ceylon.*—In British Guiana, the Cape, and Ceylon, the solemnities required in the celebration of the act of marriage, in order to render it valid, are:—

1st. A declaration before the magistrate or commissaries for mar-



riage causes, of the desire of the parties to intermarry, and a request of the three Sundays' publication of the banns.(f)

2ndly. The payment of the stipulated duty on marriages.(g)

3rd. The marriage banns or proclamations, which are three in number,(h) and must run without interruption, are published at the court house, or in the church, in the domicil of the bride and bridegroom, or where within a year and a day they last lived.(i) These publications run from eight to eight days: unless for very weighty reasons it be permitted to publish two or three in one day.(k)

In the case of opposition to the marriage, on the ground of a previous contract, or for other reasons, the party opposing applies to the [ \*46 ] judge, or proper authority, and enters a caveat \*against the marriage,(l) whereon the usual proceedings take place and an appeal lies.(m)

4thly. After the regular and uninterrupted publication of the banns, follows the completion of the marriage. Formerly, where the parties were of the reformed religion, the marriage was performed by a minister in the church; and if they were of a different religion,(n) by a magistrate at the court-house. But now, in all cases, it is celebrated by the magistrate.(o) Many persons still adhere to the old custom of having the ceremony performed in church, but this is optional and not necessary.

A marriage, wherein the above solemnities are not observed, is null and void.(p)

*Order in Council as to the Celebration of Marriages in the Crown Colonies.*—An order in council has been made respecting marriages within the colonies of British Guiana, Trinidad, St. Lucia, the Cape of Good Hope, and Mauritius, and all islands and territories dependant upon any of such colonies, and for establishing such regulations relative to marriages as are rendered necessary by the change which has taken place in the condition of society in such colonies.(q) The order recites, that "since the abolition of slavery throughout the British colonies, plantations and possessions abroad, the marriage laws of the said colonies, plantations, and possessions have been found inappropriate to the altered condition thereof, and inadequate to the increased desire for lawful matrimony therein: and recites that it is expedient and necessary to amend the said marriage laws, and to adapt the same to the altered state and condition of society in the said colonies, plantations and possessions," it is therefore ordered, that it shall be lawful for any minister of the christian religion, ordained or otherwise set apart to the ministry of the christian religion, according to the usage of the persuasion to which he may belong, to publish, within the colonies of British Guiana, Trinidad, St. Lucia, the Cape

(f) Vost. lib. 23. tit 2, n. 3; Van Leenen Cons. For. lib. 1, c. 14; Van der Keessel Thes. 83, 84, 85; Pol. Ordonn. art. 3.

(g) Ordonn. 26 Oct. 1695; Public, 3 December, 1695.

(h) Pol. Ordonn. art. 3.

(i) Arntzenii Inst. Jur. Belg. Civ. part 2, tit. 3, a. 69.

(k) Loenius Decis. et Observ. Cas. 79, pp. 513, 528.

(l) Arntzenii Inst. Jur. Belg. Civ. d. l. a. 61.

(m) Van der Keessel Thes. 81.

(n) Pol. Ord. art. 3; Arntzenii, d. l. a. 64, seq.

(o) Public Holl. 7 May, 1795.

(p) Pol. Ordonn. art. 13; 1 Burge on Foreign Law, 174, 175.

(q) London Gazette, Tuesday, September, 18, 1838.

of Good Hope, and Mauritius or any of them, banns of marriage between \*persons desirous of being joined together in matrimony, and after such banns shall have been duly [ \*47 ] published in the manner therein prescribed, to solemnize matrimony between the said parties according to such form and ceremony as shall be in use or be adopted by the persuasion to which the minister solemnizing such marriage shall belong. The order then proceeds to authorize the solemnization of the marriages of persons under age, without the consent of the parents or guardians or other person (if any) whose consent is required by law, unless such parents or guardians or other person, or one of them, shall forbid the marriage, and give notice thereof to such minister before he has solemnized the same. And in places where there may not be any such minister of religion, or not a sufficient number of such ministers to afford convenient facilities for marriage, it provides for the appointment, by the governor of the colony of a marriage officer to solemnize marriages within such part or parts of the colony in which such appointment shall be made, as the governor shall from time to time direct. The order also provides for the public solemnization of the marriages before witnesses, and for the registration of the marriages. The order then legalizes retrospectively all marriages contracted and solemnized previous to the abolition of slavery in the said colonies, plantations and possessions, between slaves, and between parties, one of whom was a slave, and also in some cases between free persons of colour, and since the abolition of slavery, between apprentices and other persons of free condition, by ministers of the christian religion other than clergymen of the church of England; and indemnifies all persons who may have solemnized any such marriages or reputed marriages, or who have in any manner assisted thereat; and provides for the preservation of the evidence and registers of such marriages; and also legalizes retrospectively marriages *de facto* between persons, one or both of whom were in the condition of slavery, but which marriages *de facto* had never been sanctioned by any public ceremony, or formally registered, upon such persons, within one year after the coming into operation of this order, duly solemnizing the marriage ceremony before any clergymen of the established church, \*or in any manner authorised by this [ \*48 ] order; and making a declaration, attested by the witnesses present, and signed by the minister or marriage officer before whom the ceremony was performed, of the fact of the marriage, and the names and ages of the children born of the marriage. This order also contains directions as to the registration of marriages.

*Newfoundland.*—The stat. 57 Geo. 3, c. 51, for regulating the celebration of marriages in Newfoundland,—after reciting that a doubt existed whether the law of England, requiring religious ceremonies in the celebration of marriage to be performed by persons in holy orders, for the perfect validity of the marriage contract, was in force in Newfoundland; and by reason of this doubt, marriages had been of late celebrated in Newfoundland by persons not in holy orders; and that great inconvenience and irregularities might arise if these doubts should continue to prevail,—enacted, “that after the 1st January, in the year 1818, all marriages had in Newfoundland

should be celebrated by persons in holy orders; and all marriages which should be contracted or celebrated in Newfoundland contrary to the act, after the 1st of January, in the year 1818, should be void." This act did not extend to any marriages which might be had under circumstances of peculiar and extreme difficulty in procuring a person in holy orders to perform the celebration, and in which the law might on that account otherwise determine on the validity of such marriages. In all such cases the circumstances of the case, and the actual contract of marriage, were required to be certified on the oath of the parties, before the magistrate nearest to the usual residence of the parties, or either of them, or before some other person duly authorised by the governor or officer administering the government at Newfoundland, to administer such oath.

This act did not extend to marriages had before the 1st January, 1818.

The 5 Geo. 4, c. 68, repealed the preceding act after the 25th March, 1825, and declared all marriages before the 17th June, 1824, in Newfoundland, and which had not been adjudged void, and all [ \*49 ] marriages there previously to the 25th \*March, 1825, as valid as if the 57 Geo. 3, c. 51, had not passed.

The 2d section of 5 Geo. 4, c. 68, required all marriages thereafter to be had in Newfoundland to be celebrated by persons in holy orders, except in the cases thereafter provided for. One of the principal secretaries of state, or the governor of the colony, was empowered to grant licenses to celebrate marriages within the colony or its dependencies to any teacher or preacher of religion in the colony, not following any trade or business, or other profession or employment than that of a schoolmaster, provided such persons took the oaths prescribed by 52 Geo. 3, c. 155.(s) Such licensed persons were empowered to celebrate marriages in cases where, by reason of the difficulty of internal communication, the woman could not without inconvenience repair, for the purpose of contracting marriage, to some established church or chapel. A penalty was imposed for celebrating a marriage in any case where such inconvenience did not exist, although the marriage was not rendered invalid by reason of any such illegality on the part of the person celebrating it.(t) The presence of two credible witnesses was required at the celebration of such marriages under a penalty; but the want of such witnesses did not invalidate the marriage.(u) The act also contains provisions as to the certificates and registers of marriages.(x)

This act was to remain in force for five years only,(y) but it was continued by subsequent acts.(z) By statute 2 & 3 Will. 4, c. 78, s. 1, his majesty, or any governor, lieutenant-governor, or officer administering the government of Newfoundland, in pursuance of any commission addressed by his majesty, with the advice or consent of the Houses of General Assembly convoked by his majesty from the inhabitants of the colony, was empowered by any acts to be from time to time for that purpose passed, to repeal in whole or in part, or to amend, alter, or vary the act, 5 Geo. 4, c. 67, (for the better adminis-

(s) 5 Geo. 4, c. 68, s. 3.

(t) Sect. 4.

(u) Sect. 5.

(x) Sections 6—8.

(y) Sect. 10.

(z) 10 Geo. 4, c. 17; 2 & 3 Will. 4, c. 78.

tration of justice in Newfoundland,) and the abovementioned acts 5 Geo. 4, c. 68, and the 10 Geo. 4, c. 17.

\*In pursuance of this power by stat. 3 Will. 4, c. 10, of [ \*50 ] the colonial parliament, the 5 Geo. 4, c. 68, was repealed, except so far as such act repealed the 57 Geo. 3, c. 51, and except so far as it legalized all marriages in Newfoundland had within a certain period, and declared them to be valid. By the 2d section, all marriages are to be celebrated by persons in holy orders, or by any resident minister publicly recognized as the pastor and teacher of any congregation having a church or chapel, or employed as such teachers or preachers, being duly licensed to celebrate marriage by the governor. Such marriages must be celebrated in the presence of two credible witnesses, under a penalty; but the want of such witnesses shall not invalidate the marriage. It is made a misdemeanor, subject to a penalty not exceeding 50*l*., for persons authorized to celebrate marriage to perform any marriage between any two persons, either of whom shall be under age without having published banns thereof on three successive Sundays in some church or chapel; or if there be no church or chapel, then after notice of the intended marriage shall have been placarded in some conspicuous public place of resort for three weeks preceding the celebration of the proposed marriage, or without having first obtained the consent of the parents or guardians of such person or persons under age.

All marriages are to be registered in a book to be kept for that purpose in the church or chapel where the marriage is celebrated. The register, or a copy attested by the clergyman or teacher licensed as aforesaid, is made proof of the due celebration of the marriage.(a)

Where the residence of any woman about to be married shall be distant ten miles from the residence of the nearest clergyman, or teacher or preacher licensed as aforesaid, any magistrate, being first duly licensed by the governor to celebrate such marriage, and if there be no such teacher, nor any magistrate licensed as aforesaid, residing within fifteen miles of the woman about to be married as aforesaid, then any layman duly licensed by the governor may celebrate marriage between any persons resident in such place as aforesaid.(b) Persons celebrating marriages where there is no church or chapel, are to transmit a certificate thereof to the colonial secretary within twelve months, under a penalty of 5*l*., [ \*51 ] who is to enter the same in a register of marriages to be by him kept for the purpose, and to be open for inspection, and on payment of 2*s*. 6*d*. a correct copy of such entry is to be given.(c) And such last-mentioned register, or an attested copy thereof, is to be received as evidence of the due celebration of such marriage.

*Upper Canada.*—In Upper Canada, by the 33 Geo. 3, c. 5, s. 1, "marriages of all persons not under any canonical disqualification to contract matrimony, which before the passing of the act had been publicly contracted before any magistrate or commanding officer of a post, or adjutant, or surgeon of a regiment acting as chaplain, or any other person in any public office or employment, were confirmed,

(a) Sect. 5, 6.

(b) Sect. 8.

(c) Sect. 9.

and the parties who had contracted such marriage, and the issue thereof, intitled to all the rights and benefits, and subject to all the obligations arising from marriage and consanguinity, in as full and ample a manner as if the said marriages had respectively been solemnized according to law." The act prescribes the method of preserving the testimony of such marriages, and makes the register of such marriage or an attested copy thereof, sufficient evidence of such marriage and the birth of children.(d) The act then provides,(e) "that until there should be five parsons or ministers of the Church of England, severally incumbent or doing duty on and in their respective parishes, in any one district within the province, parties, when neither of them are living within the distance of eighteen miles of any parson or minister of the Church of England, might apply to any neighbouring justice of the peace within the district, and declare the same; whereupon such justice should cause to be affixed in some public place within the township or parish wherein the parties reside, or if they should reside in different townships or parishes, then in the most public place within each of the said townships or parishes, a notice of their intention, in the form therein mentioned." The marriage may [ \*52 ] then \*be celebrated by the justice of the peace according to the form prescribed by the church of England. The act having pointed out the manner in which the arrival of the requisite number of ministers shall be made known, enacts "that the authority of the justices of the peace to marry shall then cease, and that any marriage performed by them shall be null and void to all intents and purposes whatsoever."(f)

It is no valid objection to the legality of any marriage theretofore solemnized by any parson or minister, either by licence, or after due publication of banns, or thereafter to be solemnized, that the same was not solemnized in a church or chapel duly consecrated, nor is any such marriage on account thereof to be held or taken to be illegal.(g)

By a subsequent act of the legislature of Upper Canada,(h) "the minister and clergyman of any congregation or religious community of persons professing to be members of the church of Scotland, or Lutherians, or Calvinists, who shall be authorized in manner therein-after directed, may celebrate the ceremony of matrimony according to the rites of such church or religious community between any two persons, neither of whom are under any legal disqualification to contract matrimony, and one of whom shall have been a member of such congregation or religious community at least six months before the said marriage."

But "no person is to be taken or deemed to be a minister or clergyman of any such congregation or religious community, within the intent and meaning of this act, who shall not have been regularly ordained, constituted, or appointed, according to the rites and forms of such congregation or religious community, and unless he shall have appeared before the justices of the peace assembled in quarter sessions, in the district which he shall reside, when not less than six magistrates, besides the chairman, shall be present, and shall have

(d) Sect. 2.

(e) Sect. 3.

(f) Sect. 5.

(g) Sect. 6.

(h) 38 Geo. 3, c. 4, s. 1.

with him at least seven respectable persons, members of the congregation or religious community to which he belongs, who shall be him to be their minister or clergyman, and unless he shall produce proofs of his ordination, \*constitution, or appointment at office, and have taken the oath of allegiance."(i) [ \*53 ] is further enacted, "that no such minister or clergyman shall at any time celebrate the ceremony of matrimony between any two persons as above described, unless he shall, on three several Sundays or on three several days, he shall celebrate the said ceremony, openly, and with a loud voice, in the church, chapel, meeting-house, or other place of worship of such congregation or religious community, either in some intermediate part of the service, or immediately before it begins, or immediately after it is ended, declare his intention so to do; and shall, at the time of making such declaration, also declare the number of persons he shall have made such declaration respectively; or unless the minister or clergyman shall have been duly authorized by license, under the hand and seal of the governor, to celebrate the said ceremony between the two persons therein named."(j)

he parties married may demand of the minister, in the form herein mentioned, a certificate of the marriage, which is to be returned.(k)

*Lower Canada.*—The decrees of the council of Trent were never admitted as of authority in France. The ordinance of Blois, art. 40; the edict of Henry 4, of Dec. 1606; and the declaration of Louis 13, art. 1, constituted the marriage law of that kingdom before the Revolution. It was required that at the celebration of the marriage, witnesses should assist with the curé, who was to receive the consent of the parties, and join them together in wedlock according to the form practised in the church. The priest was prohibited from celebrating the marriage of any other persons than those who were his own parishioners, unless with the written permission of the curé or the bishop. There must have been a previous publication of banns on three successive days in the church of the parish in which the parties resided; or in the churches of both their parishes, if they lived in different parishes.(l) \*Those ordinances were introduced into Lower Canada.(m) Since this province has [ \*54 ] become a part of the British dominions, certain marriages celebrated before the Revolution have been made legal by the Legislature.

By 44 Geo. 3, c. 11,(n) all marriages solemnized since 13th September 1759, in Lower Canada, by any minister or reputed minister of the church of Scotland, or by any protestant or reputed protestant minister, or by any justice of the peace, are declared to be valid in law to all civil purposes. But the act did not confirm any marriage between persons who could not legally marry, nor confirm any marriage which should be celebrated after the passing of that act.

The 1 Geo. 4, c. 19, contains a similar confirmation of marriages theretofore solemnized in the inferior district of Gaspé. And

Foot. 2.

Sect. 4.

Sect. 5.

Pothier, *Traité de Mariage*, part iv. c.

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1, n. 349, 362; D'Azuresseau, tom. 5.

(m) 1 Burge on Foreign Law, 175, 176.

(n) 2d May, 1804.

and the parties who had contracted such marriage, and the issue thereof, intitled to all the rights and benefits, and subject to all the obligations arising from marriage and consanguinity, in as full and ample a manner as if the said marriages had respectively been solemnized according to law." The act prescribes the method of preserving the testimony of such marriages, and makes the register of such marriage or an attested copy thereof, sufficient evidence of such marriage and the birth of children.(d) The act then provides,(e) "that until there should be five parsons or ministers of the Church of England, severally incumbent or doing duty on and in their respective parishes, in any one district within the province, parties, when neither of them are living within the distance of eighteen miles of any parson or minister of the Church of England, might apply to any neighbouring justice of the peace within the district, and declare the same; whereupon such justice should cause to be affixed in some public place within the township or parish wherein the parties reside, or if they should reside in different townships or parishes, then in the most public place within each of the said townships or parishes, a notice of their intention, in the form therein mentioned." The marriage may [ \*52 ] then \*be celebrated by the justice of the peace according to the form prescribed by the church of England. The act having pointed out the manner in which the arrival of the requisite number of ministers shall be made known, enacts "that the authority of the justices of the peace to marry shall then cease, and that any marriage performed by them shall be null and void to all intents and purposes whatsoever."(f)

It is no valid objection to the legality of any marriage theretofore solemnized by any parson or minister, either by licence, or after due publication of banns, or thereafter to be solemnized, that the same was not solemnized in a church or chapel duly consecrated, nor is any such marriage on account thereof to be held or taken to be illegal.(g)

By a subsequent act of the legislature of Upper Canada,(h) "the minister and clergyman of any congregation or religious community of persons professing to be members of the church of Scotland, or Lutherians, or Calvinists, who shall be authorized in manner thereafter directed, may celebrate the ceremony of matrimony according to the rites of such church or religious community between any two persons, neither of whom are under any legal disqualification to contract matrimony, and one of whom shall have been a member of such congregation or religious community at least six months before the said marriage."

But "no person is to be taken or deemed to be a minister or clergyman of any such congregation or religious community, within the intent and meaning of this act, who shall not have been regularly ordained, constituted, or appointed, according to the rites and forms of such congregation or religious community, and unless he shall have appeared before the justices of the peace assembled in quarter sessions, in the district which he shall reside, when not less than six magistrates, besides the chairman, shall be present, and shall have

(d) Sect. 2.

(e) Sect. 3.

(f) Sect. 5.

(g) Sect. 6.

(h) 38 Geo. 3, c. 4, s. 1.

then with him at least seven respectable persons, members of the congregation or religious community to which he belongs, who shall declare him to be their minister or clergyman, and unless he shall produce proofs of his ordination, \*constitution, or appointment to that office, and have taken the oath of allegiance.”(i) [ \*53 ]

It is further enacted, “that no such minister or clergyman shall at any time celebrate the ceremony of matrimony between any two persons as above described, unless he shall, on three several Sundays before he shall celebrate the said ceremony, openly, and with a loud voice, in the church, chapel, meeting-house, or other place of worship of such congregation or religious community, either in some intermediate part of the service, or immediately before it begins, or immediately after it is ended, declare his intention so to do; and shall, at each time of making such declaration, also declare the number of times he shall have made such declaration respectively; or unless such minister or clergyman shall have been duly authorized by license, under the hand and seal of the governor, to celebrate the said ceremony between the two persons therein named.”(j)

The parties married may demand of the minister, in the form therein mentioned, a certificate of the marriage, which is to be registered.(k)

*Lower Canada.*—The decrees of the council of Trent were never admitted as of authority in France. The ordinance of Blois, art. 40; the edict of Henry 4, of Dec. 1606; and the declaration of Louis 13, 1639, art. 1, constituted the marriage law of that kingdom before the revolution. It was required that at the celebration of the marriage, four witnesses should assist with the curé, who was to receive the consent of the parties, and join them together in wedlock according to the form practised in the church. The priest was prohibited from celebrating the marriage of any other persons than those who were his own parishioners, unless with the written permission of the curé of the bishop. There must have been a previous publication of banns for three successive days in the church of the parish in which the parties resided; or in the churches of both their parishes, if they resided in different parishes.(l) \*Those ordinances were [ \*54 ] extended to Lower Canada.(m) Since this province has become part of the British dominions, certain marriages celebrated there have been made legal by the Legislature.

By 44 Geo. 3, c. 11,(n) all marriages solemnized since 13th September 1759, in Lower Canada, by any minister or reputed minister of the church of Scotland, or by any protestant or reputed protestant dissenting minister, or by any justice of the peace, are declared to be valid in law to all civil purposes. But the act did not confirm any marriage between persons who could not legally marry, nor confirm any marriage which should be celebrated after the passing of that act. The 1 Geo. 4, c. 19, contains a similar confirmation of marriages theretofore solemnized in the inferior district of Gaspé. And

(i) Sect. 2.

(j) Sect. 4.

(k) Sect. 5.

(l) Pothier, *Traité de Mariage*, part iv. c.

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1, n. 349, 362; D'Aguisseau, tom. 5.

(m) 1 Burge on Foreign Law, 175, 176.

(n) 2d May, 1804.



the 5 Geo. 4, c. 25, confirms in like manner similar marriages theretofore solemnized in the district of St. Francis.

The act 35 Geo. 3, c. 4, was passed in Lower Canada to establish the form of registers of baptisms, marriages, and burials; to confirm and make valid in law the register of the protestant congregation of Christ Church, Montreal, and others which may have been informally kept, and to afford the means of remedying omissions in former registers.

*St. Lucia.*—By the ordinance of March, 1685, art. 10, the rites enjoined by the ordinance of Blois, and the declaration of 1639, were extended to St. Lucia, and constituted the matrimonial law of that colony,<sup>(o)</sup> until the recent alterations made by the order in council already mentioned,<sup>(p)</sup> which extends to this colony.

*Nova Scotia.*—The law of Nova Scotia, in order to obviate the difficulties which the inhabitants experienced in procuring a clergyman, makes valid all marriages theretofore solemnized before magistrates, and other lay persons, in the presence of one or more credible witness or witnesses, where the parties so married have cohabited [ \*55 ] together, and enacts "that they \*shall be deemed to be lawful, and of as much force and validity, as if they had been solemnized before a minister of the church of England, with all the forms required by law; and makes the issue of the marriages thereby confirmed legitimate."<sup>(q)</sup>

By a subsequent act,<sup>(r)</sup> the governor for the time being is authorized to appoint such fit and proper persons as he shall think necessary, within any of the townships or districts in the province, wherein no regular or licensed clergyman doth reside, to solemnize marriages within such townships or districts, between parties, both of whom shall have resided one month at least, within such township or district, by license or otherwise, as required by the laws of the province; and all marriages so solemnized shall be as good and valid in law as if the same had been solemnized by any regular licensed clergymen."

A certificate of such marriages is directed to be filed within thirty days with the clerk of the peace, who is to record the same.<sup>(s)</sup>

Upon the application of any persons desiring to enter into the marriage state, the lieutenant-governor or commander in chief of Nova Scotia may direct licenses to the duly ordained and settled ministers of any congregations of Christians dissenting from the church of England, authorising such minister to solemnize marriage between such persons without publication of banns, according to the forms of the church or religious persuasion to which such minister shall belong, in the same manner as licenses are now granted to clergymen of the established church. But the man or woman to be married without publication of banns shall belong to the same persuasion of Christians to which the minister to whom they shall require such license to be directed shall belong.<sup>(t)</sup>

1 Vict. c. 17, (17th April, 1838,) enacts that all marriages theretofore celebrated in the island of Cape Breton, bona fide, or which have

(o) 1 Burge on Foreign Law, 176.

(p) *Ante*, p. 46—48.

(q) 33 Geo. 3, c. 5, s. 1.

(r) 35 Geo. 3, c. 2.

(s) Sects. 2 and 3.

(t) 2 Will. 4, c. 31.

been contracted by civil agreement before one or more witnesses, and wherein the parties did truly and honestly believe themselves to be entering into the marriage contract, and where the parties so married have cohabited together as man and wife by reason and virtue thereof, shall be deemed and taken, and are thereby declared to be, from the time of the entering into such marriage contract, for all intents and purposes whatsoever valid and lawful, as if the same had been solemnized with all the forms and requisites required by law.

By the 3 Vict. c. 94, the act 2 Will. 4, relating to marriage licenses is continued for one year, from 27th March, 1840, and thence to the end of the then next session of the general assembly.

*New Brunswick.*—By the law of New Brunswick,<sup>(u)</sup> “the intention of the parties making a contract of marriage being made known to the parson, vicar, curate or other person in holy orders of the church of England, in the town or parish where they respectively reside; or in case there be no person \*in holy orders in [ \*56 such town or parish, then to a justice of the peace, proclamation thereof shall be made by such person in holy orders at some church, chapel, or other public place of meeting for religious worship in the town or parish, or towns or parishes, where such parties and each of them respectively reside, during the time of divine service, on three Sundays successively; or in case there shall be no person in holy orders of the church of England, such justice of the peace shall cause a notification of such banns of matrimony in writing, subscribed with the hand of such justice of the peace, to be affixed to some visible part of such church or chapel or other public place of meeting for religious worship, or some other public building, to be directed and appointed by such justice of the peace and situate as aforesaid, on three Sundays successively; and if there shall be no lawful impediment or objection after such publication or notification of banns as aforesaid, it shall be lawful for such or any other parson, vicar, curate, or other person in holy orders of the church of England, or any such justice of the peace as aforesaid, where there shall be no parson, vicar, curate or other person in holy orders of the church of England as aforesaid, and they are hereby respectively authorised to solemnize and take the acknowledgment of marriage between such parties.” Provided “that in case they, or either of them, are within the age of twenty-one years, consent thereto shall be first had of the father or guardian of the party or parties within the age last mentioned.” It provides also “that any marriage so to be solemnized by any such justice of the peace shall be solemnized and performed in the manner and form which shall be directed by the governor.”<sup>(v)</sup> A penalty was imposed on any person other than a clergyman of the church of England or justice of the peace, assisting in any marriage contrary to the act, which did not extend to ministers of the kirk of Scotland solemnizing marriages between persons of that communion, nor to Quakers, in case both parties to the marriage were Quakers, nor to Roman Catholic priests between persons of that communion. But “no justice of the peace can celebrate a marriage

(u) 31 Geo. 3, c. 5.

(v) 31 Geo. 3, c. 5, s. 1. *Acts of the*

*General Assembly of New Brunswick*, vol. 1, pp. 170, 171.

[ \*57 ] without a \*commission from the governor. And then only when no clergymen of the church of England resides and officiates in the parish.(x)

4 Will. 4, c. 30, an act for the further regulation of the formation of the court of governor and council, for the determination of all suits and controversies touching and concerning marriage and divorce.

By 4 Will. 4, c. 46, s. 1, it is enacted, that nothing contained in stat. 31 Geo. 3, c. 5, shall extend to prevent any minister or teacher of any denomination of Christians in this province, such ministers or teachers not being engaged in any secular calling, and being British-born subjects, actually resident in the province, chosen and elected or licensed, and having taken the oaths agreeably to the directions and provisions of the act, 26 Geo. 3, c. 4, from celebrating and solemnizing marriage agreeably to the forms and usages of their respective churches or denomination, such minister being licensed by the governor for that purpose.

Sect. 2. Every marriage solemnized under this act shall be in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and certificate to be made, attested, transmitted and registered as required by 52 Geo. 3, c. 21, and 54 Geo. 3, c. 12.

Sect. 3. No marriage shall be solemnized by any minister, teacher or ordained person, thereunto authorised either by the 31 Geo. 3, c. 5, or *this act*, until after proclamation shall be made, with an audible voice, of such intended marriage, in some church, chapel, or other place of meeting for religious worship, in the town or parish where such parties or one of them reside, during the time of divine service, except a license be first had and obtained therefor under the hand and seal of the governor or commander in chief.

1 Vict. c. 42, confirmed by order in council, dated 5th November, 1838, it is enacted, that any ordained person, minister or teacher, duly authorised or licensed to solemnize marriage, either under 31 Geo. 3, c. 5, or 4 Will. 4, c. 46, entitled "An act to extend the privilege of solemnizing marriage to all ministers or teachers of the several religious congregations in this province," may solemnize marriage between any persons, whether or not such persons be of the communion or denomination of the ordained person, minister or teacher solemnizing the marriage, any thing in either of the said recited acts to the contrary notwithstanding, subject nevertheless in all other respects to the respective regulations and provisions of the said recited acts.

*Prince Edward's Island.*—By an act of the legislature of Prince Edward's Island, "marriages which had theretofore been solemnized by any clergymen or minister of the gospel officiating as such, or by any justice of the peace, or other lay person, either by virtue of license from any governor, lieutenant-governor, or other commander in chief of the island, or by publication of banns, or otherwise, where such marriages have been solemnized in the presence of one or more credible witness or witnesses, and where the parties so married have

(x) 8 Geo. 4, c. 9, s. 1.

cohabited together, shall be, and the same are thereby declared, lawful and valid, and the issue of all such marriages are thereby made legitimate to all intents and purposes whatsoever.”(y) It also enacts, “that all clergymen and ministers of the gospel, of whatever sect or denomination, officiating as such in any congregation, and all others whom the governor, lieutenant governor or commander-in-chief of the island, may thereto authorize, shall thereafter have power and authority to solemnize marriage, either by license from the governor, lieutenant governor, or commander-in-chief for the time being, or after publication of banns in some church, chapel, or other place of public worship, on three Sundays successively, during divine service.(z) And any clergyman or minister of the gospel, or other person who shall after the passing of the act, solemnize any marriage without such license or publication of banns as aforesaid, or who shall solemnize any marriage between parties, of whom one or both are under the age of twenty-one years, having parents or guardians living, without the consent of such parents or guardians shall forfeit and pay for every such offence the sum of one hundred pounds, and the marriage of any such person or persons under the age of twenty-one years, without such consent shall be null and void.”(a) It also enacts, that if any person being married do marry again, the former husband or wife being alive, such offence shall be felony; but no attainder for that offence shall \*work any corruption of blood, loss of dower, [ \*58 ] or disherison of heirs.

*Bahamas.*—Marriages are usually solemnized in the Bahamas by a minister of the established church, after the publication of banns, or by license from the governor as ordinary. Where there is no resident minister (as in the out islands) the governor, by license, authorizes some magistrate to perform the ceremony. The only act of parliament relating to marriages in force here is the 32 Hen. 8, c. 8. There is no jurisdiction in the colony competent to pronounce a sentence of divorce. On a question which was put by the commissioners as to the effect of a marriage celebrated abroad, according to the law of the country where the same was had, between persons possessed of real property in that colony, in regard to such property, supposing the law of the two places to differ thereon—the examiners stated as their opinion, that the wife would in such case be entitled to dower in the real estate, according to the laws of England, which prevail here; and they thought it would make no difference in this respect whether the marriage had been celebrated bona fide or *in fraudem legis domicilii originis*.

The examiners further stated, that a marriage celebrated out of the colony, between parties who had children before such marriage, would not have the effect of legitimating such children in that colony, although a contrary law might prevail where such marriage was solemnized, as in Scotland for example.(b)

An act for the regulation of marriages within the Bahama islands,

(y) Laws of Prince Edward's Island, 6 Geo. 4, c. 6, s. 1.

(z) Sect. 2.

(a) Sect. 3.

(b) Third Report (2d series) on the Administration of Justice in the West Indies, &c. dated 24 Feb. 1829, pp. 77, 78, and Appendix, p. 156.

and for other purposes was passed in the year 1839, authorizing any minister of the Christian religion, ordained, or otherwise set apart to the ministry of the Christian religion, and acknowledged as such by any known sect or society of Christians in the united kingdom of Great Britain and Ireland, according to the usages of the persuasion to which such minister shall belong, to publish banns, &c. The act also contains provisions for the registration of marriages, &c.

*Barbadoes.*—By the law of Barbadoes, every parson, curate, or other person, who shall marry any person without publication of the banns or without license, was liable to forfeit 100*l.* and to suffer six months' imprisonment.(c) A collated copy of an entry in the marriage register at Barbadoes was admitted as evidence.(a)

In March, 1839, an act was passed to amend the laws relating to marriage in this island, requiring the publication of banns, and the marriage to be registered in a particular form, and authorizing ministers of the Christian religion to publish banns for three Sundays preceding the solemnization of a marriage, during either morning or evening service.

In a recent case before Dr. Lushington, the evidence to establish the fact of a marriage in Barbadoes was a printed paper, signed by the rector of a parish there, but the court would not receive it without proof of collation, but held, that with such proof and with the act of the legislature of Barbadoes establishing a registry in the island, such [ \*59 ] entry would \*be satisfactory proof of the marriage, without insisting upon the evidence of persons present. The conclusion of the cause was rescinded, in order to admit a collated and examined copy.(d)

*Jamaica.*—By 3 Vict. c. 60, ss. 13, 14, 15, the provisions of the 4 Will. 4, c. 31, ss. 12, 13, 14. are re-enacted.

By the 3 Vict. c. 60, s. 45, registers of baptisms, marriages, and burials, solemnized according to the rites of the established church, are directed to be kept by the rector or officiating minister of every parish.

By 3 Vict. c. 60, s. 55, it is enacted, that an extract or copy from the register books, kept in the several parishes, certified under the hand of the rector or officiating minister, or an extract or copy of any return made under that act from the record thereof, in the bishop's office of registry, and certified under the hand of the registrar; or by the oath of a witness, who had compared the extract or copy with the register book in the parish, or with the record thereof in the bishop's office of registry, shall be admitted in all courts and places as legal evidence to the extent the original itself would go.

The act 3 Vict. c. 60, is to continue in force from the passing thereof until the 31st December, 1847.

3 Vict. c. 67, An act to legalize, register and confirm marriages by dissenters, and other ministers not connected with the established church. (11th April, 1840.) By this act all marriages solemnized by dissenting ministers under the regulation thereafter mentioned, shall

No. 700, Laws of Barbadoes, p.

(d) *Cood or Coode v. Cood or Coode*, Cons. Court 23 March, 1838.

*Cood*, 1 Curteis, 755.

be valid and effectual. The act contains particular directions for the solemnization of marriages, whenever the form and ceremony shall be other than that of the united church of England and Ireland.

By 3 Vict. c. 67, s. 17, reciting that in consequence of imperfect instruction in the Christian religion, and from other causes, many marriages *de facto* have taken place, but which marriages *de facto* have never been sanctioned by any public ceremony or formally registered, and in many places the parties have had offspring of such last-mentioned marriages, and it is expedient that provision should be forthwith made for enabling such persons to confer upon their children the benefit of children born in wedlock, it is enacted, that it shall be lawful for all persons, having contracted marriage as last aforesaid, at any time within one year after the passing of this act (11th April, 1840), duly to solemnize the marriage ceremony before any clergyman of the established church, or in any other manner authorized by this act; and every person so recognizing a previous marriage *de facto*, shall, at the same time, make and sign a declaration in the form prescribed by the act, which shall also be attested by the witnesses present, and signed by the minister, before whom the ceremony is performed. Ceremony is to have relation back to the time of the marriage *de facto*, &c. Duplicate of original declaration to be made, signed and attested, and original declaration with other papers to be good evidence. Such ceremony may be performed without the publication of banns.

By the laws of Jamaica(e) a penalty of 100*l.* was imposed on any minister not qualified according to the canons of the Church of England, by having taken orders for marrying any person. And a like penalty was imposed on any minister for marrying any persons where banns had not been published three times in their parish church, or who had a license from the governor. The latter penalty was also imposed by 6 Geo. 4, c. 17,(f) and by the 38th section all baptisms, marriages, and burials in the several parishes were directed to be entered by the rectors and books to be provided, and according to schedules thereunto annexed.

By 4 W. 4, c. 31, s. 12,(g) all banns of marriage in Jamaica shall be published in an audible manner in the parish church, or in one of the consecrated or other chapels duly licensed by the bishop for the performance of divine service, of or belonging to such parish wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service.

Whenever a marriage shall not be had within six calendar months after the complete publication of banns, no minister shall proceed to the solemnization of the same until banns shall have been republished on three several Sundays, in the form and manner prescribed by this act, unless by license duly obtained from the governor.(h)

No minister shall marry any person where banns have not been

(e) 1681, No. 21, s. 13. Acts of Assembly in Jamaica, p. 19.

(f) Continued by 1 Wm. 4, c. 22; 2 Wm. 4, c. 18.

(g) This act was to continue in force from 12th Dec. 1833, until the 31st Dec. 1838.

(h) Sect. 13.

duly published, according to the provisions of the act, or have a license from the governor, under the penalty of 100*l.*; but such marriage shall nevertheless be valid, though made without banns or license.(i)

[ \*60 ] \*Registers of baptisms, marriages, and burials, are directed to be kept,(k) and copies from register books, or from the records in the bishop's office, and certified by the rector or registrar, are to be legal evidence.(l)

A married woman is entitled to dower in Jamaica as in England, and to a similar provision (subject to her husband's debts) out of the slave property undisposed of in his lifetime; also to the provisions of the statute of distribution. To the following question, "What would be the effect of a marriage celebrated abroad, according to the law of the country where the same was had, between persons of real property in the colony, in regard to such property, in cases in which the law of the two places differs as to the effect of marriage on such property?" the chief justice replied, that the law of the colony would prevail. And the attorney-general, referring to the principles laid down in the judgment of *Edwin v. Forbes*, thought that in the case contemplated by the above question, the *lex loci contractus* would yield to the *lex loci rei sitæ*. And with respect to such marriages having been celebrated, either bona fide, or in *fraudum legis loci rei sitæ*, the examiners were of opinion that the *lex loci contractus* would not be allowed to have any effect, but that the law of the colony would prevail in either case.

In the case of a marriage celebrated abroad, where a law prevails which legitimates children born before marriage, such children would in that colony be considered illegitimate.

There is no jurisdiction in this colony competent to pronounce any sentence of divorce; and there is a positive instruction to the governor, to withhold his assent to any act of the legislature dissolving a marriage. The chief justice had no doubt but inconvenience must result from the want of such jurisdiction.(m)

*Montserrat.*—An act to repeal two certain acts relating to marriages, and to make new enactments in lieu thereof in Montserrat was passed the 2d January, 1839. The act contains particular directions as to the solemnization and registration of marriages.

*Antigua.*—The act of the Antigua legislature contains a recital, that the late necessity of that island for want of orthodox ministers had been such, that divers marriages had been had and solemnized, [ \*61 ] by virtue or colour of certain orders of \*the governor and council, in some other manner than had been formerly used and accustomed.(n) For the preventing all doubts and questions touching the same, it then enacts, "that all marriages theretofore had and solemnized, or which should thereafter be had and solemnized in that island, by and before any justice of the peace, or any one of the council of that island for the time being, according to the direction or true intent of any order of the governor and council for the time being, or reputed order, shall be adjudged, esteemed, and taken to be,

(i) Sect. 14.

(k) Sect. 46.

(l) Sect. 57.

(m) *First Rep. (2d series) on Administra-*

tion of Justice in the West Indies, dated 29th June, 1827, pp. 46, 47.

(n) 24 Car. 2, 1672, n. 21, s. 1. See Laws of the Leeward Islands, pp. 44, 45.

and to have been, of the same and no other force and effect as if such marriage had been had and solemnized by an orthodox minister, according to the rites and ceremonies established or used in the church or kingdom of England, any law, custom or usage to the contrary thereof notwithstanding.”(o) It further enacts, “that the act shall not extend to authorize or confirm any marriages had or solemnized by any other than an orthodox minister, after the arrival of any such minister as aforesaid, he being beneficed in the island.”(p) And it is further enacted, that the lawfulness of marriages shall be tried by a jury of twelve men.(q)

*Dominica.*—By an act of the Dominica legislature, “all marriage ceremonies theretofore performed in that island by any of his majesty’s justices of the peace, when no Protestant clergyman was to be found to perform the same, and also all marriages which thereafter should be performed by any of his majesty’s justices of the peace under the like circumstances, are, and the same are declared to be as lawful and valid in law, as if performed by a regular inducted clergyman.”(r)

*Grenada.*—By the law of Grenada(s) the marriage, in order to be valid, must be solemnized “by the rector of one of the cures in the island, after due publication of banns, according to the rubric of the Church of England, in the church of the parish wherein the woman to be married resides, or by virtue of a license granted by the governor or commander in \*chief for the time being. And all marriages performed otherwise than after due publication of [ \*62 ] banns, or under license as aforesaid, are declared to be null and void, to all intents and purposes whatsoever.” Persons professing the Roman Catholic religion may have the ceremony of their marriage performed by their own clergy, according to the rites of their own church, without incurring the penalty imposed thereby on marriages without banns or license; but it is enacted, “that such marriages should be, and were declared to be, of no force or effect, as to giving a right of dower, inheritance, or any other rights derived from a legal marriage; but that to entitle the parties to those rights, they must also conform as other subjects to the several restrictions imposed on the celebration of matrimony.”

An act was passed 13th December, 1831, to render valid the registry of all such marriages, baptisms and burials, in the several parishes of these islands, as may not theretofore have been witnessed and attested according to law, and to render such signature or attestation unnecessary in future. It enacted, that every entry which has been made in the registers of the several parishes of these islands, having the signature of the rector or officiating minister alone affixed thereto, shall be deemed sufficient evidence of every such baptism, marriage or burial, therein entered, to all intents and purposes, notwithstanding the attestation of the clerk or other person shall have been omitted, and that to all future entries in the said several registers respectively the signatures of the rectors of the said cure alone, or of

(o) Sect. 2.

(p) Sect. 3.

(q) Sect. 4.

(r) No. 35, s. 7, 28th Sept. 1802.

(s) No. 101, s. 31, 11th Dec. 1807. The Laws of Grenada, vol. i. p. 261.



the officiating minister thereof, shall be sufficient, and render all such entries therein valid and legal.(c)

An act was passed in 1840, by the colonial legislature, to render valid and legal all marriage ceremonies performed by ministers of the Presbyterian church, duly authorized priests of the Roman Catholic religion, Wesleyan missionaries, and licensed ministers of every denomination of Christians, and to provide for the legal registration of all marriages, baptisms and funerals, performed by other than clergymen of the established church.(d)

*Isle of Man.*—By the marriage act of the Isle of Man, 1757, banns of marriage must be published upon three several Sundays. If either of the parties be alieus or strangers who shall come to the isle, no banns shall be published unless such stranger shall have resided in the isle at least three months, and one month in the parish before publication.

Marriages solemnized in any other place than a church, unless by special license, or solemnized without publication of banns or license of marriage from a person having authority to grant the same, are declared null and void. The churchwardens are directed from time to time, as there shall be occasion, to provide proper books in each parish, in which all marriages and banns of marriage there published and solemnized shall be registered.(t)

(c) Laws of Grenada, 266, 13th Dec. 1831.

(t) See Stowell's Statutes, &c., of the Isle

(d) This act has not been confirmed by an order in council, and certain amendments in 106; Com. Dig. Navigation, (F 2.)

have been suggested.

#### SECT. 4.—OF THE MARRIAGES OF QUAKERS AND JEWS.

1. Of the Marriages of Quakers . . . . .	62
2. Of the Marriages of Jews . . . . .	67

1. *Of the Marriages of Quakers.*—In the act of 6 & 7 Will. & Mary, c. 3, s. 57, 58, imposing a duty upon marriages, Quakers, Papists, and Jews, cohabiting as man and wife, were required to pay [ 62 ] the said duty as if they had been married \*according to the law of England; and there was a proviso, that nothing therein contained should be construed to make good or effectual in the law any such marriage or pretended marriage, but that they should be of the same force, and no other, as if the said act had not been made.

It is said that marriages between Quakers according to their own ceremonies, have been recognized as legal by courts of law. In 1661, such a marriage was held valid at the assizes at Nottingham in a cause of ejectment.(a) In the case of *Harford v. Morris*, Mr. Justice Willes said, that he remembered a case many years ago upon the circuit where a Quaker brought an action of crim. con., in which it

(a) Sowell's Hist. of Quakers, 492; 1 of Lord Keeper Guilford, by North, p. 126. Hagg. Cons. R. Appen. 9. See 1 vol. of Life

was necessary to prove the marriage. The objection was taken, that he was not married according to the rites of the Church of England; and the point was argued, but it was overruled, and the plaintiff recovered thereon.(b)

Buller, in treating of the action for adultery, says, "it has been doubted whether the ceremony must not be performed according to the rites of the church, but as it was an action against a wrong-doer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Anabaptists, Quakers, or Jews."(c)

It is stated by Wood,(d) "that a marriage de facto, or in reputation (as amongst the Quakers, &c.) is allowed to be sufficient to give title to a personal estate; because the lawfulness of the marriage is not in issue, or the point to be tried. For the issue is, whether a marriage was contracted between the parties or not, or whether the parties lived in a married state, where the legality of it does not come in question. As to the lawfulness, the bishop's opinion after he hath heard the cause must determine it."

In the case of *Green v. Green*,(e) a Quaker woman instituted a suit for the restitution of conjugal rights against her husband; and the libel was dismissed, because they were not \*married [ \*64 ] according to the forms of the church of England. In *Dodson v. Halswell*(f) the suit was between two Quakers, in which the libel pleaded a marriage had in the manner usually observed by those of their religion, by the public declaration thereof at their monthly meetings in the form pleaded, and that notwithstanding the defendant had refused to solemnize and consummate. The defendant admitted the contract, but alleged that it was conditional. There had been two sentences against the defendant in the Consistory Court of Durham, and afterwards at York. It does not appear what was the result of the proceedings in the Delegates. It should seem, however, that Quakers have the same right to relief on the violation of any matrimonial duty, as Jews.(g)

*Exception in the Marriage Acts.*—The marriages of Quakers and Jews were excepted from the provisions of the 26 Geo. 2, c. 33. The 31st section of that act having provided that nothing in that act contained should extend to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage should be of the people called Quakers, or persons professing the Jewish religion, respectively. A similar exception is contained in stat. 4 Geo. 4, c. 76, s. 31, and in the act relating to marriages in Newfoundland.(h)

This exception is confined in its operation to cases where the parties are both Quakers or both Jews.(i)

It has been decided that Quakers are included in the Irish stat. 21

(b) 1 Hagg. C. Appen. 9.

(c) Bull. N. P. 28, Woolston & Scott, per Denison, J., at Thetford, 1753, where plaintiff was an Anabaptist, and recovered 500*l*. See Dougl. 166.

(d) Inst. b. 1, c. 6, p. 59. See 2 Burn's Eccl. Law, 485.

(e) 1 Hagg. Cons. R. Appen. 9, 10.

(f) Deleg. 1750; 1 Hagg. Cons. R. Appen. 9.

(g) See post, p. 72, 73.

(h) 5 Geo. 4, c. 63, continued by 10 G. 4, c. 17, and 2 & 3 Will. 4, c. 78; ante, p. 48, 49.

(i) *Jones v. Robinson*, 2 Phill. R. 285.

& 22 Geo. 3, c. 25, though the words of the act may seem not applicable to them.<sup>(j)</sup>

*Validity of Quakers' Marriages.*—The validity of the marriages of Quakers does not appear to have come in question in England, at least not in any reported case since the passing of the first marriage act. It is observed by a learned writer,<sup>(k)</sup> "this has probably arisen from their prudent and peaceful habits, and perhaps partly from the circumstance of its not being either the interest of any members of [ \*65 ] their own \*families, or the disposition of the crown to raise the objection. If the law on this subject should not be fixed by a legislative measure, and if the question should call for a judicial decision, the courts would no doubt be strongly inclined, upon obvious principles of reason and justice, as well as from the number and respectability of the persons interested, to support these marriages, whatever difficulty there may be in finding grounds upon which their validity can be reconciled with the former law; perhaps the least objectionable mode of sustaining them would be to consider the saving clause in the marriage act as a recognition precluding the inquiry into their former condition."

If contracts of marriage unattended with any religious ceremony were valid before the first marriage act, there will be sufficient ground for sustaining the validity of the marriage of Quakers, without considering the provision in that act as a recognition of their validity.<sup>(l)</sup>

*Provision in New Marriage Act.*—By 6 & 7 Will. 4, c. 85, s. 2, it is enacted, "that the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively; and every such marriage is hereby declared and confirmed good in law, provided that the parties to such marriage be both of the said society, or both persons professing the Jewish religion respectively; provided also, that notice to the superintendent registrar shall have been given, and the registrar's certificate shall have issued in manner hereinafter provided."<sup>(m)</sup>

*Ceremony of Quakers' Marriages.*—The ceremony of the Society of Friends, or Quakers, is attended with much decency and solemnity. Previous to the ceremony the man and woman present themselves at a monthly meeting of the society where they reside, and there declare their intention of taking each other as husband and wife, if the meeting have no material objections against it. The principal conditions of [ \*66 ] acceptance are the following:—1st. It is a rule that no man \*propose marriage to a woman without the consent of his own and her parents or guardians; but if the unbridled affections of any one should have precipitated him into a breach of this rule, he is required to remove the offence, as is also the woman, and to give satisfaction to such parents or guardians, and to the meeting to which they belong, by a due and open acknowledgment of the offence, and to get the consent of their guardians before they can proceed with

(j) *Haughton v. Haughton*, 1 Molloy, 614. See post, sect. 6.

(k) 2 *Roper on Husband & Wife*, by Jacob, 481; *Littell's Law Library*, April, 1841.

(l) See ante, p. 36—38.

(m) See post, as to the mode of solemnizing marriages, and stat. 6 & 7 Will. 4, c. 86, ss. 30, 31, 40, 41, as to the registration of marriages of Quakers and Jews.

the marriage. 2nd. That the parties be of the same opinion and judgment in religion, and professed members of this society. 3rd. That none shall marry within such degrees of consanguinity or affinity as are forbidden by the law of God : and 4th. That if either party has given scandal or offence to their friends, they shall acknowledge it. If no objections are then made, notice of the intended marriage is published in the meetings where the man and woman reside, or did reside, which must be done before the marriage is solemnized, in order that convenient time may be granted for satisfaction concerning all scandal, &c. The parties are required to give their attendance a second time at the monthly meeting, which is usually the next ensuing, when the persons appointed to make the inquiry return and give the answer, which, if found satisfactory, the parties are at liberty to proceed to the solemnization of the marriage. The marriage is solemnized in the ordinary meeting on a week day, usually Thursdays.

Towards the conclusion of the meeting the parties stand up, and, taking each other by the hand, declare, in an audible and solemn manner, to the following effect. The man first says: "Friends,—I take this, my friend C. D., to be my wife; promising, through Divine assistance, to be unto her a loving and faithful husband, until it shall please the Lord, by death, to separate us." After this, a friend of the man or woman reads publicly a certificate of the marriage, the names and designations of the parties being first inserted; they then sign the certificate, the man first, then the woman by her maiden name, the relations next; and in further confirmation, such of the members present as choose may adhibit their names, but do not add witness. The ceremony here closes, and the happy couple leave the chapel, arm and arm, man \*and wife, without a priest's blessing or any [ \*67 ] further solemnity.(n)

2. *Of the Marriages of Jews.*—The Jews, though British subjects under the protection of the general law of this country, have the enjoyment of their own laws in religious ceremonies, in consequence of the exceptions in the marriage acts. On deciding upon questions of this kind, the court is obliged to learn questions of Jewish law from the professors of it,(o) in the same way as foreign laws are proved in this country.

*Evidence of Jewish Law.*—It is the usual practice of the Court of Chancery to receive information on foreign law from persons professing such law, *not upon oath*, but on a reliance in the honour and integrity of the professors of that law; and the same course is pursued in the ecclesiastical court.(p) So, in order to obtain information as to

(n) Halkerston's Dig. of the Law of Scotland relating to Marriage. See Sewell's Hist. of the Quakers, 691.

(o) *Goldsmid v. Bromer*, 1 Hagg. Cons. R. 324.

For the system of Jewish and Catholic matrimony, see Seldon's *Uxor Ebraica*. Opera, vol. ii. p. 529—860; Bingham's *Christian Antiquities*, lib. 22; and Churdon Hist. Sacramens, tom. vi.

(p) In a case where it was pleaded that the parties mutually acknowledged each other as

husband and wife in the presence of witnesses at Gretna Green, which acknowledgment, the court had been told, of itself constituted a valid marriage by the law of Scotland; the court said, that it knew nothing of that, at least judicially, nor could take counsel's word, which was all that it had for that. It should have been so pleaded, accompanied with an averment to be sustained by evidence, that such was its effect by the law of Scotland. 2 Addams, R. 389.

the law of the Jews respecting marriage, questions were addressed to the tribunal of the Bethdin, and the answers to such questions, though not upon oath were used by the court.(q)

Lord Stowell held, that the judgment of the college of German Jews, to which community the party particularly belonged—the sentence of the Bethdin (a domestic forum of the Jews amongst themselves on matters of marriage,) their chief tribunal, such judgment having been submitted also to the college of Portuguese Jews, who concurred in it, were of great authority on matters of Jewish law, as they are tribunals whose certificate of the foreign law must be received as most satisfactory, though perhaps their judgment is not equally satisfactory [ \*68 ] in matters of fact. And his lordship added, “here is a question compounded of *law* and *fact*, and though the decision may not *bind* the court which has to try the fact for itself, it conveys the best information which it can obtain of the principles of law which are to be applied to it. They certify that they have found the marriage null according to the law of Moses, without giving specific reasons for it. This defect, however, is in some measure made up by the information which they have given in their examinations. I there find the grounds assigned on which I form the same opinion.”(r)

*Marriages of Jews decided according to their own Law.*—Subject to the provisions in the new marriage act,(s) the matrimonial law of England for the Jews, is their own matrimonial law; and an English court Christian, examining the validity of an English Jew marriage, will examine it by Jewish matrimonial law only.(t) If a rule of that law be, that the fact of the witness to the marriage having eaten prohibited viands, or profaned the Sabbath-day, would vitiate that marriage itself, an English court would give that effect, when duly proved, though a total stranger to any such effect upon an English marriage generally. Lord Stowell presumed that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant Consistory, but to the ritual of the Dutch Jews, established in Holland.(x)

In *Goldsmid v. Bromer*,(x) the suit was brought by Maria Goldsmid, by her guardian, for jactitation of marriage against David Bromer, who confessed the jactitation, and justified by pleading a marriage to have been celebrated, and the same to be valid, according to the law of the Jews. The parties were both Jews, and both appealed to the Jewish law, by which the question was decided. The ceremony of marriage was admitted, but it was alleged “that the celebration was not conformable to the law of the Jews.” No defect in the ceremony was alleged, except “that it is essentially necessary that it [ \*69 ] should be performed in the presence of two \*witnesses, competent and credible, and subject to no disqualification imposed by the Jewish law; which disqualifications may proceed from certain degrees of consanguinity to either of the parties who marry,

(q) *Lindo v. Belisario*, 1 Hagg. Cons. R. 248, 249.

(r) *Goldsmid v. Bromer*, 1 Hagg. Cons. R.

336.

See ante, p. 65.

(t) *Ruding v. Smith*, 3 Hagg. Cons. R. 385.

(u) Ibid. 385.

(x) 1 Hagg. Cons. R. 324.

or from non-conformity to the ceremonies of the Jewish religion:" and it was alleged "that the ceremony in this case was not attested by competent witnesses according to these rules." It appeared to the court that the fact of marriage must be attested according to the Jewish law, and that the attestation is a constituent part of the validity of the ceremony, and that it was essentially necessary that both the witnesses should be competent, inasmuch as the clearest proof of the actual ceremony would be insufficient, unless it was performed in the presence of such two attesting witnesses of perfect competency. One of the witnesses before whom the ceremony was performed, having been shown to have been incompetent, not merely to attest, but to supply a constituent part of the ceremony, by violating the rites and ordinances of the Jewish religion and profaning the Sabbath, by riding in coaches and snuffed lighted candles, stirring the fire, and eating forbidden meats, the validity of the marriage was pronounced against.(y)

*Mode of Contracting Marriage between Jews.*—There seems to exist among the Jews, as in many other communities and societies, a distinction between marriages *solemn* and *unsolemn*; that there are marriages which have certain solemnities attached to them, for the purposes of public notification, and for the complete satisfaction of the civil and ecclesiastical law, though not necessary for the purpose of validity. The solemn marriage appears to be effected by a formal contract in the Hebrew language entered into by the bridegroom with the bride, according to the formalities and rules of the congregation; and such contract must be drawn up by the priest, and be signed by the bridegroom; be entered and registered in a certain book kept for that purpose by the priest, and the entry must be signed by the bridegroom and two other witnesses, which being done, the original contract is delivered to the bride.(z)

\*The first cause in which the validity of a Jewish marriage was put distinctly in issue in an ecclesiastical court, [ \*70 ] was that of *Lindo v. Belisario*,(a) which came before that court by the direction of the Lord Chancellor. It appeared by instruments, which were annexed to each of the allegations given in, that the proceedings in the consistory court were commenced in pursuance of an order made by the Lord Chancellor, that Abraham de Mattos Mocatta should institute a suit in the consistory court of the Bishop of London in behalf of Esther Lindo, to whom he was guardian, to try the validity of the marriage said to have taken place between her and Aaron Mendez Belisario. It further pleaded, that this order was obtained by the petition of the executors of the wills of the father and the mother of the said Esther, and the trustees of a sum of money under her father's will, amounting to about 4000*l.*; that by the will of her mother, the interest of certain moneys was to be applied to her use, until she attained the age of twenty-one or day of marriage, provided she married with the consent of the major part of her mother's executors; but in case she married without such consent, then the money was to go to her issue, and in default of such issue, to be

(y) *Goldsmid v. Bromer*, 1 Hagg. Cons. R. 225.  
394—336.

(a) 1 Hagg. Cons. R. Appendix, 10.

(z) *Lindo v. Belisario*, 1 Hagg. Cons. R.

divided among the other daughters of the executrix. It was further stated, that Aaron Mendez Belisario was a person in low circumstances, and that it was a very improvident match, but that he insisted she was, in point of fact, his wife, and was married to him on the 26th of July, 1793, and threatened to institute proceedings at law to get possession of her person and property. Under these circumstances it became necessary, before the Court of Chancery could stir in the business so as to make any order, to know whether there had been a marriage, and whether the young woman, by whose guardian the suit was instituted, was a wife or not. The question was, whether the ceremony which had passed between the parties constituted a complete marriage, or whether it amounted only to a *betrothment*. The ceremony was stated to have been as follows: viz. "that before sunset, and between 11 and 12 o'clock in the morning of Friday, the 26th day of July, 1793, Esther Mendez \*Belisario, then Lindo, [ \*71 ] thereby meaning Esther Lindo, spinster, the minor in this cause, went to and met Aaron Mendez Belisario, the other party in this cause, at the house of his brother, Jacob Mendez Belisario, in Little Bennett-street, for the performance of their marriage, and Abraham Jacobs and Lyon Cohen, two credible persons of the Jewish nation, attended at the said house, to be present at the ceremony thereof; that the said Aaron Mendez Belisario, then in the presence of the said Abraham Jacobs and Lyon Cohen, addressed himself to the said Esther Mendez Belisario, then Lindo, thereby meaning the said Esther Lindo, spinster, the minor aforesaid, in the words or to the following effect: 'Do you know, that by taking this ring, (meaning a ring which he then produced to her,) you become my wife?' to which she answered, 'I do.' That he then said to her, 'Do you take this ring freely, voluntarily, and without force?' to which she answered, 'I do;' or they, the said Aaron Mendez Belisario and Esther Mendez Belisario, then expressed themselves in words to that very effect; and the said Aaron Mendez Belisario immediately thereupon, in the presence of the persons aforesaid, delivered to and placed upon the forefinger of the left hand of the said Esther Mendez Belisario, which she tendered to him for that purpose, and freely and voluntarily received and accepted the same ring, and at the same time repeated to her certain words in the Hebrew language." The general result of the evidence was, that there had been what the professors of the Jewish law called a complete *Kedushim* between the parties, which *Kedushim* would, in order to dissolve it, and in order to give the woman a power to marry again, need a divorce; but it did not of itself create a perfect marriage, because it did not give the husband the rights of marriage; for they all agreed, without any contradiction whatever, that after the *Kedushim* was given, the wife retained her rights, she had a power over her own property as much as before, and the husband had no power over it at all. Lord Stowell decided that Mr. Belisario had not proved his case, and that Esther Lindo was not to be considered as his wife; (b) \*and his decision was affirmed on [ \*72 ] appeal by the Court of Arches.(c)

(b) *Lindo v. Belisario*, 1 Hagg. Cons. R. 216—261.

(c) *Lindo v. Belisario*, 1 Hagg. Cons. R. Appendix, 7—24.

But if Jews conform in the solemnization of marriage to the Christian form, they will be bound by it, and the validity of the marriage will be decided with reference to the marriage acts. On this ground the marriage by license of a minor Jewess, without the knowledge and consent of her father, was declared null and void.(d)

*Legal Redress for Violation of Matrimonial Duty.*—All persons who stand in the relation of husband and wife in any way the law allows, or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty. The marriages of Jews are expressly protected by the marriage acts,(e) and they have the same mode of securing the legitimacy of their children, and the same rights of divorce belong to them, as to persons of a different persuasion.(f) In *Andreas v. Andreas*,(g) the parties were both Jews and were married according to the forms of the Jewish nation; the wife cited the husband to answer to her in a cause of restitution of conjugal rights. On admission of the libel it was objected, that as they had been married according to the forms of the Jewish nation, and not of the church of England, the court could take no notice of such marriage, and she could not institute such a cause against her husband in the ecclesiastical court. The court however, was of opinion, that as the parties had contracted such a marriage as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel.

On the admission of a libel, pleading "a marriage between Jews according to the rites of the Jewish religion," it was objected, that persons coming before the ecclesiastical court to claim any right by marriage, under that jurisdiction, must show the marriage to have been agreeably to the rites and ceremonies of the church Christian. Sir William Wynne said, "The ob- [ \*73 ] jection taken is, as far as I know, perfectly novel; I do not recollect any case which I can name, in which a Jewish marriage has been pleaded; and I take it there has been no case in which a Jew has been called upon to prove his marriage. If there had, I conceive that the mode of proof must have been conformable to the Jewish rites; particularly since the marriage act, which lays down the law of the country as to marriages by banns or license, for all marriages had according to the rites of the church of England, and with an exception for Jews and Quakers. This is a strong recognition of the validity of such marriages. As to dissenters there is no such exception, and no one would trust to the rules of their particular dissenting congregation for the validity of marriage. The comparison therefore, between Jews and dissenters does not hold, and more particularly in this, that the Jews are *antichristian*, the dissenters Christian." The allegation was therefore admitted.(h)

It seems that to prove a Jewish marriage it is not necessary to pro-

(d) *Jones v. Robinson*, 2 Phill. R. 285.

(g) Cons. Nov. 24, 1737; 1 Hagg. Cons.

(e) 26 Geo. 2, c. 33, s. 18; 4 Geo. 4, c. 76, s. 31.

R. Appendix, 9, n.

(f) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. Supplement, 773.

(h) *Vigevana v. Alvarez*, 1 Hagg. Cons. R. Appendix, 7.



duce witnesses who were present at the ceremony in the synagogue, but that the written contract between the parties should be produced, and the execution of it proved.(i)

#### SECT. 5.—OF MARRIAGES IN AMBASSADORS' CHAPELS.

THE general rule is, that mere domicile renders a person subject to the ordinary law of the country. Lord Mansfield laid down this general proposition, that the law and legislative government of every dominion equally affect all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privileges distinct from the natives.(a) The same doctrine had been previously promulgated by [ \*74 ] \*Huber.(b) “Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur.” This general proposition, however, is subject to some exceptions. Thus ambassadors and public ministers are not subject to the whole body of the municipal law of the country where they reside. They belong for the most part to the country which they represent. So also the Jews, though native subjects under the protection of the general law of this country, are governed by their own institutions with respect to marriages.

In some establishments existing by authority under treaties or under toleration, as in the English factories at Lisbon, Leghorn, Oporto, Cadiz; and in the factories in the East, Smyrna, Aleppo, and others, marriages are regulated by the law of the original country to which they are considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek church, but to the rubric of the church of England, when he contracts a marriage with an English woman.(c) The house and chapel of an ambassador may be considered as excepted from the marriage act, on the ground that they are part of the country to which the ambassador belongs.

There is a *jus gentium* with respect to marriage—a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in the transaction of marriage. Thus practice, which is entitled to great respect when received, has sanctioned the marriages of foreign subjects in the houses of ambassadors of the foreign country to which they belong. Lord Stowell observed, that he was not aware of any judicial recognition upon the point; but the reputation which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to judgment.(d) Lord Ellenborough said, marriages of

(i) *Horn v. Noel*, 1 Camp. 61.

(a) *Hall v. Campbell*, Cowp. 208.

(b) *De Conflict. Leg.* lib. 1, t. 3, s. 2.

(c) *Ruding v. Smith*, 2 Hagg. Cons. R. 385, 386. A register of English marriages

celebrated at St. Petersburg is transmitted to the registry of the Consistory court of London, *ib.* n.

(d) *Ruding v. Smith*, 2 Hagg. Cons. R. 386. See *Pertreis v. Tondear*, 1 ib. 136.

English subjects abroad in the chapels of \*our ambassa- [ \*75 ]  
dors, if made by the allowance of the foreign state in such  
places, would be good marriages in those countries. But if not a  
good marriage in the place where it is celebrated, it cannot be a good  
marriage any where.(e)

In *Lacy v. Dickenson*,(f) the parties who were both English subjects, who had resided at Amsterdam, went to Paris, and were married by leave of the Dutch ambassador, in his hotel, and by his chaplain, in the absence of the English ambassador. They came afterwards to England, and the wife brought a suit of jactitation in which Mr. Dickenson justified under the marriage as alleged. In reply the wife pleaded the laws of Holland, "that marriages solemnized between the subjects of their high mightinesses, or others, in a house of an ambassador of the states general in foreign countries, between the subjects of the states general, or others, unless the parties had been first contracted by the law of Holland, and such contract duly registered, and unless banns be duly published in Holland, before the performance of the same, is null and void to all intents and purposes." It pleaded also, "that by the laws of France, a marriage solemnized, not *in facie ecclesie*, and on publication of banns, and by the priest of the church of the parish where the parties live, and where they are domiciled, unless by special license and faculty, is null and void." That cause went no farther, owing to the death of the husband. Assuming however, that such a privilege does exist in ambassadors' chapels, it cannot protect a marriage, where neither party is of the country of the ambassador in whose chapel the marriage was had, nor where one of the parties to the marriage having acquired a matrimonial domicil in this country, has not during the residence in England, lived in a house entitled to the privilege. Thus a libel for nullity of marriage was admitted where the marriage had been celebrated in the chapel of the Bavarian ambassador (in which banns were not usually published,) without banns or license between parties, one of whom was in the suite of the Spanish ambassador, and not of the Bavarian, and the other, though she had the name of a foreigner, was not domiciled in any \*ambassador's family, and had [ \*76 ] acquired a matrimonial domicil in England by more than a month's residence there.(g)

In *Heinel v. Fierville* (h) the court pronounced a marriage solemnized in the Venetian ambassador's chapel invalid, on the ground that it had been celebrated in a place where banns had not usually been published.

*Marriages solemnized abroad by Ministers of the Church of England made valid.*—The statute 4 Geo. 4, c. 91—after reciting that it was expedient to relieve the minds of all his majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory

(e) *Rez v. Brampton*, 10 East, 286.

(g) *Pertreis v. Tondear*, 1 Hagg. Cons. R.

(f) Cons. R. 1769, cited 2 Hagg. R. 386, 136.

n.

(h) Cons. 1783, cited 1 Hagg. Cons. R. 137.

abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad—declared and enacted that all such marriages as aforesaid shall be deemed and held to be as valid in law as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law. The second section provided, that nothing in this act contained shall confirm or impair, or otherwise affect the validity in law of any marriages solemnized beyond the seas, except such as have been or shall be solemnized in the places, form, and manner herein specified and recited. The marriage of an officer, celebrated by a chaplain of the British army, within the lines of the army when serving abroad, is valid under 4 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command.(d)

*The statute 4 Geo. 4, c. 91, applies where only one of the Parties is a British subject.*—On a question as to the admission of the libel in a suit of nullity of marriage, by Mr. George Lloyd, natural son of Sir William Lloyd, against Mrs. Lloyd, otherwise Mademoiselle Pettijean, it appeared that the parties were married in France on the 26th October, 1837, in two forms: first before the mayor of the arrondissement, according to the code civil of that country, and afterwards at the chapel of the British ambassador at Paris. Mr. Lloyd was a British subject, Mademoiselle Petitjean a subject of France. The grounds of nullity were, that first, by the law of France, the consent of the father of a man, under twenty-five, was necessary to the validity of his marriage; that Mr. Lloyd, at the time of the contract, was but twenty-two, and that his father's consent had not been obtained; secondly, that the stat. 4 Geo. 4, c. 91, for legalizing marriages solemnized at the house of a British ambassador, did not extend to marriages where one of the parties was a foreigner. Dr. Lushington thought that it was unnecessary to consider the first marriage, nor had the law of France been properly proved. With respect to the second marriage, the construction of the statute had not been hitherto deliberately decided by any court after argument. A case had occurred in the court of Chancery, *O'Connor v. Ommaney*, in which such a marriage had been reported valid by the master; but he (the learned judge) could not find, upon inquiry of the lord chancellor and the master of the rolls, that either had given any judicial decision on the point. The first observation he should make on the statute in question was, that it was a remedial statute, and was therefore to have an extended and not a restricted construction. Then it expressly professed to remedy the grievance and hardship of "all" his majesty's subjects. Again, although it did not expressly provide for marriages where only one of the parties was a British subject, yet on the other hand, there were no words of exclusion. Under these circumstances, by invalidating the marriage, he should confine the

(d) *Waldegrave Peerage*, 4 Clark & Finn. 649.

sense of the word all, without any words of exclusion. He was therefore clearly of opinion, that the statute might be considered to include marriages where one of the parties was a British subject. He was not unaware of the danger of legalizing in England marriages celebrated in foreign countries; but the legislature had thought proper to pass a remedial law, and his duty was merely to administer it. He was of opinion that the validity of the marriage in this case could not be impeached, and consequently that the libel must be rejected.(e)

A marriage solemnized at Antwerp, between two English persons, by a protestant clergyman, appointed by the English government, but without performance of the Belgium ceremonies, is void, and does not come within the provisions of the stat. 4 Geo. 4, c. 91. In this case, a ward of the court of Chancery, in her eighteenth year, had eloped with a gentleman and been married, on the 15th of July, 1838, in the English church at Antwerp, according to the rites of the church of England, before the chaplain of such church, in the presence of the British consul. The parties had been subsequently married in England. On a reference to the master to ascertain when the parties were legally married, he found that the lady was a native of Ghent, and born in October, 1820; that the gentleman was a British subject, in his twenty-fourth year at the time of the above marriage. The master then stated, that what is called the code civil is the law in force in Belgium; and that no marriage contracted in Belgium can be valid by reason of there having been a religious ceremony only, but that a civil ceremony is necessary, and that by the 165th and 166th articles of the code civil, it is provided that marriage shall be celebrated publicly before the civil officer of the domicile of one of the two parties, and certain notices are requisite; but a marriage contracted without these prescribed ceremonies would not be void, but only voidable. That by the 148th article of the code civil, a man before the age of eighteen years and a woman before fifteen cannot contract marriage, and that a son, not having attained twenty-five, cannot contract marriage without the consent of his parents, or in case of no parents, then by a family council of relations or friends. And the master then found that the husband was only twenty-four years of age, and his wife nearly eighteen, at the time of the marriage at Antwerp: and that no civil ceremony whatever took place between them in Belgium. And the master therefore found, that no valid marriage according to the *lex loci* was made at Antwerp, by the marriage ceremony performed at the English church on the 15th July, 1838, resting therefore the proof of such finding on the ground that, *without proof of a civil celebration of marriage* having been done at Antwerp, to give legal validity there to the marriage, no perfect marriage valid according to the *lex loci* was effected. The master then stated his opinion, that previous to the act 26 Geo. 2, c. 33, the marriage would have been good as an English marriage, celebrated according to the rites of the church of England, by an English chaplain in full orders, between persons both of more than the age of consent, and describing themselves, whether accurately or not, but without fraud, to be both British subjects: that although

(e) *Lloyd v. Petitjean*, falsely calling herself *Lloyd*, Consist. Court, 30th May, 1839.

that act was repealed by the 4 Geo. 4, c. 76, yet by sect. 33 it is made to extend to England only, so that such marriage solemnized abroad, as it would have been good before the passing of the act 26 Geo. 2, so it would be now good, and therefore he found that a valid marriage did take place between the parties on the 15th July, 1838, at Antwerp, according to the subsisting English law. But if the court should not adopt such view of the case, then that a valid marriage subsequently took place in England. And the master further stated, that there was *no ambassador* from the British court accredited at Antwerp, nor any *British factory*; and that the minister who performed the ceremony was appointed by the secretary of state for foreign affairs to officiate at the English church at Antwerp. The petition prayed the confirmation of the master's report so far as it found that the marriage at Antwerp was bad and the subsequent marriage was valid. Sir L. Shadwell, Vice Chancellor, said, it seems to me that this case is now brought forward in a manner which induces me to suppose that any farther inquiry will not alter it. I think the report must be adopted, so far as the master finds the marriage contrary to the *lex loci*, and so far as that a valid marriage took place in England. My opinion is, that this case is not within the statute 4 Geo. 4, c. 91, (g) for that statute provides for the case of a marriage solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory. Now, as there is no factory or ambassador at Antwerp, the case could not come within that statute. In the judgment of Lord Stowell, in the case of *Ruding v. Smith*, (h) although the reasoning is very good and very beautiful, so far as it leads to the ultimate conclusion, still when you look at the conclusion, you cannot but see that he is meditating on the *difficulties*, which he denominates as the *insurmountable difficulties*, of effecting a marriage according to the Dutch law. Now in this case there were no insurmountable difficulties to having had a marriage according to the Belgium law, and therefore it appears to me that there are no circumstances of exception here operating to take the marriage out of the general rule, that it should have been according to the *lex loci*. (i) And it having been found by the master void, according to that *lex loci*, I really think, there being no exception to take it out of the rule, that the master's report must be confirmed as to the first finding, and the subsequent finding as to the English marriage being good, and I think the case is in that state at present, that there can be no impropriety in making the decision in that way. (k)

(g) Ante.

(h) 2 Hagg. Cons. R. 390, post, pp. 140—142.

(i) See post, pp. 132—140.

(k) *Kent v. Burgess*, Dec. 12th, 5 Jurist, 166—169; Reg. book A. 1840, fol. 150. Another point decided was, that the court,

upon an interlocutory application, may direct an inquiry, in the first place, to ascertain a fact, as that of marriage, which is necessary for the final decision of the cause. See *Golden v. Uliate*, 5 Jurist, 169; *Fullager v. Clerk*, 18 Ves. 481.

## SECT. 6.—OF MARRIAGES IN IRELAND.

THE first marriage act, 26 Geo. 2, c. 33, and the present marriage acts,(a) being confined to England and Wales, the general matrimonial law of Ireland is that which prevailed in England before the passing of the first act in 1753, except so far as it has been regulated by statutes relating exclusively to Ireland.

*Marriages in Private Houses.*—By the law of Ireland, [ \*77 ] a marriage had and celebrated by a Roman Catholic priest, in a private house, according to the rites and ceremonies of the Roman Catholic church, between two persons *both* of the Roman Catholic religion, is valid. It may be celebrated by a Roman Catholic priest, or by a priest of any other denomination, without any restriction as to time or place, either in a private house, or in the church, and in the afternoon as well as at any canonical hour.(b) In Ireland, the marriage of two Roman Catholics, by a Roman Catholic priest, is good; and if a person, at the time of such marriage, declare himself to be a Roman Catholic, and the woman be a Roman Catholic, this is a good marriage against him; and if he be afterwards tried for bigamy on this marriage (he having been before married to another wife who is still alive,) he will not be allowed to set up his supposed protestanism as a defence to the charge. To prove such a marriage, evidence was given that the person who officiated acted as a Roman Catholic priest, and that the marriage (as was usual) took place at his house, and he asked the parties if they were Roman Catholics, and that they said they were so; that part of the ceremony was in English and part in Latin, and that having asked the man whether he would take the woman as his wife, and the woman if she would take the man as her husband, and each having answered in the affirmative, he pronounced them married. This was held sufficient.(c)

A marriage in Ireland by a clergymen of the established church is good, though it takes place in a private room, either with(c) or without any special license.(d)

A marriage by a dissenting minister in Ireland in a private room is valid.

On the trial of an indictment for bigamy, it was contended on behalf of the prisoner, that the first marriage was illegal, from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the recorder is said to have been clearly of opinion that the marriage was valid, on the ground that as before the marriage act, a marriage might have been celebrated in England in a house, and it was only made necessary, by the enactment of positive law, to celebrate it in a church, some law should be shown, requiring dissenters to be married in a church, or in the face of the

(a) 4 Geo. 4, c. 76; 6 & 7 Wm. 4, c. 85.

(b) *Bruce v. Burke*, 2 Addams, 471.

(c) *Regina v. Orgill*, 9 Carr. & P. 80.

(c) *Smith v. Maxwell*, 1 Carr. & P. 271; 1 Ry. & M. 80.

(d) *Wright v. Elwood*, 1 Curteis, 49.

congregation, in Ireland, before this marriage could be pronounced to be illegal; whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25, enacted, that all marriages between protestant dissenters, celebrated by a protestant dissenting teacher, should be good, without saying at what place they should be celebrated.(e)

[ \*78 ] *\*Evidence of Marriage.*—As marriages in Ireland may be had without any celebration *in facie ecclesiæ*, or in the presence of witnesses, such marriages may be proved by slenderer evidence than is requisite to the proof of a marriage in England. Circumstantial evidence is admissible for that purpose; and if a fact of marriage be clearly proved by such evidence, the presumption is in favour of the legality of the marriage. Such presumption will not be rebutted by the circumstance of the marriage having been secret as to the precise time when it was solemnized, where the marriage was neither tainted with fraud nor contrary to the policy of the law. A party relying upon the invalidity of a marriage, upon the ground of its having been celebrated by a Popish priest, must prove that fact by clear evidence.(f)

(e) *Rex v. —*, Old Bailey, January Sessions, 1815, cor. Sir J. Sylvester, Recorder, 1 Russ. on Crimes, 205, 2d ed. The first marriage upon which the question arose, took place in 1787, at Londonderry; the second marriage was in London, according to the ceremonies of the church of England.

(f) *Steadman v. Powell*, 1 Addams, R. 58. The facts whether the parties had been married in Ireland, were briefly as follows:—Margaret Steadman, the deceased, was an attendant upon the late Duchess Dowager of Rutland, and accompanied her grace to Ireland, whither she proceeded, in the summer of 1784, to join her husband, the late Duke of Rutland, then in Ireland, of which kingdom he had been recently appointed lord-lieutenant. Powell, the party in the cause, was at that time in the service of General Finch, one of his grace's aid-de-camps, and living, as such, at Dublin Castle, or the Phoenix Lodge, near Dublin, the official residences of the Irish viceroy; so that Powell and the deceased, on the arrival of the latter in Ireland, were members in a manner of one family. In the summer of 1786, the deceased became pregnant, as she said, and as it "was rumoured," by Powell: on becoming acquainted with which pregnancy, her mistress, the duchess, refused to continue her in her service, unless as the wife of Powell. It further appears, that Dr. Preston (then or soon after Bishop of Ferns,) at that time private secretary to the duke, interested himself to procure a marriage between the deceased and Powell, at the request of the duchess, and caused it to be intimated to the latter, through a fellow servant, that his marriage with Steadman was necessary to either of the two keeping their places. A fact of marriage between the parties, to say the least, was asserted by themselves, and is generally understood by others, to have

taken place accordingly. Nor was this permitted by the duchess to rest upon the report of the parties, or upon general rumor merely; an instrument, purporting to be a certificate of the marriage, was produced to the Duchess of Rutland, and was shown by her to the duke, her husband, who being satisfied (as it should seem by inspection of this certificate) that the parties were really married, suffered the deceased to retain her situation in his wife's service. This certificate was pleaded to have been lost or mislaid; it was said by the Duchess of Rutland to have been torn or destroyed, as she understood, on the occasion of some quarrel between the parties. It was further proved, that from and after that time, the deceased was constantly addressed by the name and treated as the wife of Powell; that she was permitted by the duke and duchess to lie-in at the Phoenix Lodge, where she gave birth to a son, who was baptized as her lawful issue by Powell; that on the return of the duchess from Ireland, the deceased accompanied her still as an attendant, and continued in her service, uninterruptedly, until compelled to relinquish it by bodily infirmity, in the month of January, 1819; that during this whole interval, Powell and the deceased acknowledged each other as husband and wife, and were so reported and taken by all who knew them; that Powell was under the necessity of living much apart from the deceased, both whilst he continued in the service of General Finch, and when, upon quitting it, he became a king's messenger, in which capacity he was occasionally absent in foreign parts; but that he frequently did, and was permitted at all times, to cohabit with the deceased, as well at the several residences of the Duchess of Rutland, specified in the plea, as elsewhere; lastly, that the deceased had two other children, the issue of her connection with Pow-

*\*Celebration by a Person in Orders.*—It seems that in Ireland it is essential that the marriage should be performed by a person in orders; which rule is *positivi juris*, marriage not having been celebrated by the clergy in the earlier times; and formerly it was held, that a marriage by a layman, erroneously instituted to a cure, was good.(g)

In the case of *Arthur v. Arthur*, the question was, whether the parties were married; a Romish priest swore he married them; the Archbishop of Dublin required him to exhibit his orders; he refused, and the archbishop rejected his testimony. The Court of Delegates held he was not obliged to show his orders, but he must show he was a reputed clerk.(h)

*Enforcement of Matrimonial Contracts.*—The Irish stat. 12 Geo. 1, c. 3, enacted, that a marriage consummated should not be set aside on the ground of a pre-contract without consummation. The power of enforcing matrimonial contracts, with this qualification, existed in Ireland till the stat. 58 Geo. 3, c. 81, the third section of which provides that there shall be no proceeding in any ecclesiastical court in Ireland to compel a celebration of a marriage *in facie ecclesiæ* by reason of any contract.

*Marriages between Protestants and Catholics.*—One of the objects of the earlier Irish statutes(i) was the prevention of \*inter-marriages between Protestants and Catholics, and sub- [ \*80 ] jected such protestants as should marry papists, and the ministers celebrating such marriages, to divers penalties and disabilities.

But these statutes have been so far repealed by the 32 Geo. 3, c. 21, Ir.(k) that protestants, and persons professing the Roman Catholic religion, are permitted to intermarry; and persons having lawful jurisdiction may grant licenses for marriages to be celebrated between protestants and catholics, and clergymen of the established church, or protestant dissenting ministers may publish the banns of marriage between such persons; provided, however, that neither protestant dissenting ministers nor popish priests shall celebrate marriages between protestants of the established church and Roman Catholics. The 19 Geo. 2, c. 13, Ir.,(l) “also provided that every marriage between a papist and any person who had been, or had professed himself to be a protestant at any time within twelve months before celebration of marriage, or between two protestants, if celebrated by a popish priest, should be void without any process, judgment, or sentence of law.” And it is also a proviso of 33 Geo. 3, c. 21, Ir.,(m)

all, born in this country, one (a daughter) in the house of the Duchess of Rutland, in Arlington street, both of whom were constantly owned and acknowledged by the parties themselves to be their lawful issue, were maintained and educated as such at their joint expense, and were constantly reputed and taken for such by their friends, relations, and acquaintances.

(g) 1 Brown's Civil Law, 74, 75, 2d edit.

(h) 1 Lee's R. 29, cited 2 Hagg. Cons. R. 401; ante, p. 34.

(i) 9 Will. 3, c. 3, Ir.; 2 Anne, c. 6, s. 5,

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Ir.; 9 Geo. 2, c. 11, s. 6, Ir.

(k) Sects. 12 and 13.

(l) Sect. 1.

(m) Sect. 12. On the 26th of February, 1836, a bill was introduced in the House of Commons, but did not pass, to repeal so much of the act of the nineteenth year of King George the Second, as makes void all marriages celebrated by any popish priest between protestant and papist. After reciting that the law then in force in Ireland under the said act, annulling all marriages celebrated between protestants and Roman Cath-



[ \*81 ] which \*relieves catholics from all penalties and disabilities in general, save such as protestants are liable to (but with certain exceptions,) "that nothing therein should authorize any popish priest, or reputed popish priest, to celebrate marriage between protestant and protestant, or between any person who had been, or professed himself to be a protestant at any time within twelve months before such marriage, and a papist, unless such protestant and papist should have been first married by a clergyman of the protestant religion." A penalty is imposed on every popish priest, or reputed popish priest, who should celebrate any marriage contrary to this provision.

By stat. 3 & 4 Will. 4, c. 102, so much of the Irish acts, 6 Anne, 12 Geo. 1, 23 Geo. 2, 12 Geo. 3, and 33 Geo. 3, as contains any penal enactment which exclusively affects a Roman Catholic clergyman celebrating marriage between any persons, knowing them or either of them at the time of such marriage to be of the protestant religion, or as declares or enacts, that any Roman Catholic clergyman who shall celebrate any marriage between two protestants, or reputed protestants, or between a protestant, or reputed protestant, and a Roman Catholic, shall be guilty of felony, and suffer death as a felon, without benefit of clergy or of the statute, or as enacts and declares, that any Roman Catholic clergyman who shall celebrate any marriage between two protestants, or between any such protestant and papist, unless such protestant and papist shall have been first married by a clergyman of the protestant religion, shall forfeit the sum of five hundred pounds to his majesty upon conviction thereof, was repealed after the 29th of August, 1833. But nothing therein contained

[ \*82 ] shall extend to any proceeding, criminal \*or civil, commenced before the passing of the act; nor repeal so much of any of the said acts as expressly or by implication repeals any former act or acts, nor to revive or recognize any enactment as being in force at the time of the passing of this act, which by any act theretofore made was expressly or by implication repealed or altered.(π)

olics by Roman Catholic priests, frequently occasioned serious difficulties in the titles to lands and hereditaments, and in many cases rendered doubtful the legitimacy of children, and was occasionally taken advantage of by evil-disposed persons; and therefore it was expedient to repeal the said act to the extent aforesaid. It was proposed absolutely to repeal so much of an act passed in the nineteenth year of the reign of his majesty King George the Second, intituled "An act for annulling all marriages to be celebrated by any popish priest, between protestant and protestant or between protestant and papist, and to amend and make more effectual an act passed in this kingdom in the reign of her late majesty Queen Anne, intituled 'An act for the more effectual preventing the taking away and marrying children against the wills of their parents or guardians,'" as relates to marriages celebrated by Roman Catholic priests between protestant and Roman Catholic; but nevertheless so as not to render *valid or in any manner affect any marriage,*

the invalidity of which is now or hath been disputed or questioned, under or by virtue of the said act, in any of his majesty's courts ecclesiastical or civil in Great Britain or Ireland.

It further provided, that after the day to be named, no marriage which shall be celebrated between a Roman Catholic and any person professing himself or herself to be a protestant, shall be valid, unless the same shall be so celebrated between the hours of eight and twelve in the morning, and in some church, chapel or place which shall have been used, for the space of one year at least previous to the celebration of such marriage, as a public place for divine worship.

But the proposed act was not to repeal any enactments then in force for preventing the performance of the marriage ceremony by degraded clergymen, or for preventing the marriage of persons under age; but that the said acts should be in full force and effect as if the proposed act had not passed.

(π) Section 2.

And it is enacted, that nothing in this act shall extend or be construed to extend to the giving validity to any marriage ceremony in Ireland, which ceremony is not now valid under the existing laws, or to the repeal of any enactments now in force for preventing the performance of the marriage ceremony by degraded clergymen.(o)

The 19 Geo. 2, c. 13, (Ir.) makes void all marriages celebrated by a popish priest "between a papist and any person who hath been, or hath *professed* himself or herself to be a protestant at any time within twelve months before such celebration of marriage between two protestants."

Therefore, where one E. K., the illegitimate son of a Roman Catholic mother, was brought up in his youth in the Roman Catholic religion, and was afterwards married by a Roman Catholic priest to a Roman Catholic, he not having *conformed* to the protestant religion in the manner prescribed by the statutes relating to uniformity; but upon the trial of an ejectment brought by a remainder-man, relying on such marriage as valid, evidence was given that E. K. had on several occasions, in several years previous to the marriage, and also within twelve months before the marriage, attended at divine service in protestant churches, and that he was considered by many persons as a protestant; which was opposed by the evidence of other persons, who stated that he had, during that period, attended on several occasions Roman Catholic places of worship, and was considered by many to be a Roman Catholic: the judge charged the jury, "that if they believed upon the evidence that E. K. was brought up in the Roman Catholic religion, and previous to the said celebration of marriage had been a Roman Catholic, yet that no *statutable conformity* was necessary to invalidate such marriage; and that there was legal and sufficient evidence to go to them for \*their consideration, that E. K. was a person who had *professed himself to be a protestant* [ \*63 ] at some time within twelve months before the celebration of the marriage within the meaning of the stat. 19 Geo. 2, c. 13 (Ir.): and if they believed that within twelve months before the said marriage he had professed himself to be a protestant, though he did not conform to the protestant religion by performing the ceremonies specified in the several statutes relating to conformity, they should find a verdict for the defendant; but that such profession must be an unequivocal one, such as receiving the sacrament, or attending the religious rites of the protestant church, or performing acts of religious duty, such as a Roman Catholic would not do." Under that charge a verdict having been found for the defendant; upon a bill of exceptions it was held that the judge's charge was right, and judgment was given for the defendant.(p)

*Marriages of Protestant Dissenters.*—The Irish stat. 11 Geo. 2, c. 10, s. 3, after reciting that several protestants dissenting from the church of Ireland, as by law established, scrupling to be married according to the form of ceremony prescribed by the said church, did therefore frequently enter into matrimonial contracts in their own congregations, before their ministers or teachers, and thereupon lived together as husband and wife, enacted, that for the ease of such pro-

(o) Section 3.

(p) *Kirwan v. Kirwan*, 1 Batty, 712.

testant dissenters who had already entered, or should thereafter enter, into such matrimonial contracts, and thereupon live together as husband and wife, that they should not be prosecuted in any ecclesiastical court, *ex officio mero*, or on the presentment of any minister or churchwarden of any parish, for or by reason of their entering into such matrimonial contracts, or for their living together as husband and wife by virtue of such contracts, provided such protestant dissenters, and such minister or teacher, had or should take the oaths and subscribe the declaration according to the Irish stat. 6 Geo. 1, c. 5.

By 21 & 22 Geo. 3, c. 25, all matrimonial contracts and marriages between protestant dissenters, and solemnized by dissenting ministers [ \*84 ] or teachers, are valid to all intents; and \*all parties to such marriages, and all persons claiming under them, shall, in virtue of such marriages, be entitled to all rights and benefits in like manner as persons of the established church, and as if the same had been solemnized by a clergyman of the church of Ireland; provided, that nothing therein should make void or be construed contrary to the several acts made in the reign of Geo. 1, and Geo. 2, for preventing clandestine and other marriages therein specified.

The Irish stat. 21 & 22 Geo. 3, c. 25, s. 1, provided that all matrimonial contracts or marriages between protestant dissenters, and solemnized by protestant dissenting ministers or teachers, should be valid. Lord Chancellor Manners, on a question of forfeiture under a will, was quite satisfied, and thought it admitted no doubt, that Quakers' marriages were meant to be included in the above act, though the words of the act might seem not to apply to them. (p)

*Marriages by Minors without Consent of Parents or Guardians.*—In Ireland the consent of parents was not by the common law essential to the validity of marriage. The Irish stat. 9 Geo. 2, c. 11, enacts, that all marriages and matrimonial contracts where either of the parties is under the age of twenty-one years, had, without the consent of the father (if living) in writing under his hand, first had, or, if dead, of the guardian, obtained in the same manner, or of the lord chancellor, in case no guardian be appointed, shall be void to all intents, and shall not be deemed as marriages or contracts by any spiritual court, if either of the parties be entitled to any real estate of the value of 100*l.* per annum, or to any personal estate of the value of 500*l.*; or if the father or mother of the party so marrying under age be in possession of a real estate of the value of 100*l.* per annum, or of any personal estate of the value of 2000*l.* And by sect. 2, it shall be lawful for the father or guardian of any person who shall marry, or be contracted in marriage, when under the age of twenty-one years, or if there be no father or guardian, for any person to be appointed by the lord chancellor, to commence a suit in the proper ecclesiastical court to disannul such marriage, &c. which suit shall be prosecuted [ \*85 ] with effect; and if it appears in such \*suit, by proper proof, that either of the parties was, at the time of such marriage, &c. under the age of twenty-one years, such marriage shall be adjudged by such court to be void. But by sect. 3, if no such

suit be commenced within one year after, such marriage or contract shall from the expiration of such year be good to all intents and purposes.

By Irish stat. 23 Geo. 2, c. 10, provisions are made for the removal of certain difficulties with respect to such suits.

On an indictment for bigamy, if the first marriage was in Ireland, it is no objection that it was by license when one of the parties was under age, and that there was no consent of parents, unless such marriage was vacated on that ground within a year, under the above stat. 9 Geo. 2, c. 11.(g)

*Irish Statutes.*—By stat. 41 Geo. 3, c. 90, s. 9, copies of the statutes of Great Britain and Ireland, prior to the Union, printed by the printer duly authorized, shall be received (mutually) as conclusive evidence of the several statutes in the courts of either kingdom.

#### SECT. 7.—OF MARRIAGES IN SCOTLAND.

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1. *Of Regular Marriages.*—There exists a radical and original difference between the marriage law of England and Scotland; the basis of which, as we have already seen, is the canon law.(a) The early state of the law of marriage in Scotland is said to be involved in greater obscurity than is observable in the law of other European nations which acknowledged the Roman See.(b)

By the law of Scotland there are only two kinds of marriage, regular and solemn, or irregular and clandestine. The distinction between void and voidable marriages is not [ \*86 ] recognized by that law as in England.(c)

In Scotland, the public solemnity of marriages is a matter of order but it is not essential to marriage. The consent of parties, which constitutes the marriage, may be expressed before a civil magistrate, or even before witnesses, and it is not necessary that a clergyman should be present.(d)

(g) *Rex v. Jacobs*, 1 Ry. & M. C. C. 140.

(a) Ante, pp. 21, 22.

(b) 1 Stair's Inst. p. 26, n. by Brodie.

(c) Bell's Case of Putative Marriage, 211.

See post, p. 89. In the first Marriage Act, 26 Geo. 2, c. 33, there is an express exception that it should not extend to Scotland. Sir W. Wynne said he remembered the passing of that act; and that there was an intention at the time of introducing another act of parliament, which was to extend to Scotland; but by the act of Union the state of religion is not to be touched, it is to remain exactly as it was, and therefore there was a difficulty

arising out of the act of Union in applying the marriage act to that country. 2 Hagg. Cons. R. 448.

Shortly after the order for bringing in the English Bill for the better preventing clandestine marriages, an order was made for the Lords of Session in Scotland to prepare a similar bill for that part of the kingdom. Lords' Journals, 17 April, 1753, vol. 28, p. 98.

(d) Stair's Inst. b. 1, tit. 4, s. 6; Ersk. Inst. b. 1, tit. 6, s. 5; Bank. Inst. b. 1, tit. 5, s. 2; *McAdam v. Walker*, 1 Dow. 148; post, p. 93.

A regular marriage in Scotland requires, first, the publication of banns; and, second, that the ceremony shall be performed by a clergyman, before at least two credible witnesses. Banns are proclaimed on three several Sundays in the parish churches of the parties, while the people are met for divine service. They announce a purpose of marriage between them by their names and designations or descriptions; requiring all concerned to state any objection which they may know to the union. The only express regulations relating to banns are ecclesiastical, and have been recognized by the legislature no farther than by general statutory prohibitions against clandestine and unorderly marriages, under pecuniary penalties.(e) A certificate of the session clerk is received as legal evidence of proclamation of banns on three different Sundays.(f) Although it is not required to a regular marriage *in facie ecclesie* that the ceremony shall be performed in church, it is requisite that it shall be performed by a clergyman. The want of his presence does not indeed affect the validity [ \*87 ] of the marriage,(g) \*but it exposes the parties and celebrator to penalties.(h) The clergyman must be either of the Kirk of Scotland,(i) or of Episcopal Communion, duly qualified by the taking of the oaths of allegiance and abjuration.(k)

By stat. 4 & 5 Will. 4, c. 28, s. 1, so much of certain acts of the parliament of Scotland therein mentioned(l) as prohibited the celebration of marriages in Scotland by Roman Catholic priests or other ministers, not belonging to the established church of Scotland, or imposed any fine or penalties on persons so married, or on the priests or ministers celebrating such marriages or marrying such persons, was repealed.

The second section enacts, "that it shall be lawful to all persons in Scotland, after due proclamation of banns there, to be married by priests or ministers not of the established church, and also for such priests or ministers to celebrate marriages without being subject to any punishment, pains, or penalty whatever."

Two witnesses legally capable of giving testimony must be present, who know the parties. No special form of words is necessary to be used in the ceremony. But there is generally, 1st, a solemn admonition to the parties; 2nd, the question of mutual acceptance solemnly put, and an answer required, as in the Roman *stipulatio*; and 3d, a declaration made by the clergyman that the parties are married.(m)

## 2. OF THE CAPACITY OF PARTIES TO MARRY.

*Age of Consent.*—By the laws of Scotland the capacity of consenting to marriage commences at the age of fourteen in males, and of twelve in females, but under those ages they are incapable of consent,

(e) Bell's Principles of the Law of Scotland, 414, 3d ed.; Ersk. book 1, tit. 6, s. 10; Ferg. Cons. Law, 168.

(f) Ersk. b. 1, tit. 6, s. 10.

(g) 1 Ersk. 6, s. 11; Ferg. Cons. Law, 111; Canons of Perth Act, 65. Carruthers, Dec. 11, 1705; Mor. 3253; *Craufurd's Trustees v. Hart's relict*, Mor. 12698.

(h) 1661, c. 34; 1672, c. 9; 1690, c. 27;

1698, c. 6.

(i) 1661, c. 34; 1695, c. 12. See 2 Hume's Crim. Law, 327; Ivory's Ersk. p. 125, n. 143.

(k) 10 Anne, 7.

(l) 1 Parl. Car. 2. sess. 1, c. 34; An. 1661, 1 Parl. Will. sess. 7, c. 6, An. 1698.

(m) Bell's Principles of the Law of Scotland, 414, 415, 3d ed.

and therefore of marriage; but minors may, after puberty, marry, or by solemn consent ratify a previous marriage, without consent of parents or guardians.(n)

\*The father's consent was by the Roman law, essential [ \*88 ] to the marriage of children *in familia*; but by the law of Scotland children may enter into marriage without the knowledge and even against the remonstrance of a father.(o)

The law which, in both England and Scotland, allows a minor to marry, attributes to the party, in a way which cannot be legally averred against upon the mere ground of youth and inexperience; a competent discretion to dispose of himself in marriage; he is arrived at years of discretion as to this, whatever he may be with respect to other transactions of life; and he cannot be heard to plead the indiscretion of minority, still less can the habits of a particular profession exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation, which the law would impose upon him by virtue of that engagement. The law of Scotland binds a party, though a minor, a soldier, and a foreigner, as effectually as it would do if he had been an adult living in a civil capacity, and with an established domicile in that country.(p)

There have been cases of marriage where the young man was fourteen and the young lady twelve, in which more effect has been given to the supposed operation of deceit and fraud upon such persons, than perhaps can be fully justified, recollecting, that the law has said, that at their ages, they are perfectly capable of giving full and deliberate and sufficient consent; though some allowance must be made for the difference of discretion between 21 and 14, yet with respect to the particular contract of marriage, the law, strictly speaking, has [ \*89 ] \*held them equally capable as older persons of giving their consent.(q)

A girl of twelve years of age is capable of marriage, but being very susceptible of undue influence, and liable to be unjustly trepanned, her marriage at that age, under circumstances of suspicion, must be proved by more accurate evidence of consent than is necessary between adult parties.(r)

A marriage *in facie ecclesie*, the girl being just turned twelve years, was annulled on the ground of her extreme youth, deception, undue influence, and fraud, which had been practised by the man to obtain her consent.(s)

(n) Ersk. b. 1, tit. 6, s. 2; Erskine's Principles of Law of Scotland, 67, 11th ed.; see 2 Addams R. 375.

(o) Ersk. Principles of the Law of Scotland, 11th ed. p. 69.

(p) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 60, 61.

(q) 2 Bligh N.S. 499, 500. See *Honyman v. Campbell*, 2 Dow & Clark, 280.

(r) *Cameron v. Malcolm*, Mor. p. 12680.

(s) *Allan v. Young*, 1 Halk. Dig. of the Law, relating to Marriage in Scotland, 318, pl. 3.

*Idiots, &c.*—Idiots are incapable of marriage; and madmen, except during a lucid interval.(t)

*Former Marriage undetermined.*—There can be no second marriage where the parties to the first are alive and undivorced; and neither bona fides nor personal exception will protect the second marriage against challenge. In a case which occasioned much discussion, the question was, whether a lady, who was alleged to have been privately married, having afterwards, during the lifetime of her husband, contracted a second marriage with a gentleman ignorant of the first, the child of that second marriage was, or was not legitimate, on account of the bona fides or ignorance of its father.

No proof was taken of the averments of the parties, but the alleged private marriage of the lady was denied; and the facts which were assumed, by the direction of the court, for the purpose of raising the question of law, were, that a young lady, an heiress, was, while several years under the age of twenty-one, prevailed on by a gentleman, then also under age, to consent to a marriage, which, though the forms required by the church were complied with, was private, in so far as it was concealed from the knowledge of her relations; that she returned to her mother's house immediately after the ceremony was performed; that her husband, who very soon thereafter (or, according to the defender's statement, next \*day) left the kingdom, never appeared, or claimed her as his wife; and that the marriage never was communicated to any of her relations till after his death; that a few years afterwards the lady entered into a second marriage, with a gentleman who was entirely ignorant of the first; that they immediately went home to her mother's house, where they resided (with the exception of a few months, during which they lived at the husband's seat in the country,) till the following year, when she was delivered of a son, and that she died within a few days thereafter.

After her death, on a question whether her son or a collateral relation was intitled to take up the succession to her estate, in a declarator of nullity of marriage and bastardy, against the second husband and the child of that marriage, the judges were equally divided in opinion, and ordered the case to be further discussed; but one of the parties having died soon after that order was issued, the matter was settled extra-judicially.(u)

*Incapacity for Conjugal Duties.*—The incapacity of the parties to perform conjugal duties, is a ground on which marriage may be declared void, at the instance of either of the parties, but not of itself a nullity which can be pleaded by others.(x)

*Consanguinity and Affinity.*—Another impediment is from relationship, either of consanguinity or of affinity. In consanguinity or relationship by blood, the forbidden degrees comprehend ascendants and descendants to the most remote degree; collaterals *in loco parentis*,

(t) Blair Mor. p. 6293; *M Adam v. Walker*, 1 Dow, 148.

(u) Bell's Report of a case of legitimacy under a putative marriage before the Court of Session, in Feb. 1811. It seems that the children of the second marriage are clearly

legitimate, where no consummation of the first marriage had taken place. *Ib.* p. 6. *Cameron's case*, select decisions, No. 109.

(x) Erskine, b. 1, tit. 6, s. 7; *Mor.* 13915. See post, Ch. III. s. 3.

also *in infinitum* those of the whole or half-blood who are within the second degree; whereby cousins-german and all of more remote degree may intermarry.(y)

In affinity or relationship by marriage the husband and wife being *one*, the blood relations of each are held as related \*by affinity in the same degree to the one spouse as by consanguinity to the other. The view on which, in England, it has been considered as lawful for a husband to marry his sister-in-law, after the death of his wife, was not admitted in Scotland, where a marriage contracted within the degrees of propinquity or affinity forbidden by law is void.(z)

### 3. OF IRREGULAR MARRIAGES.

#### *Modes of contracting Irregular Marriages.*

Marriages in Scotland may be effectually entered into, without the intervention of any religious ceremony, in any of the three following ways:

1. By a promise of marriage given in writing, or proved by a reference to the oath of the party, followed by a *copula*.

2. By a solemn and deliberate mutual declaration exchanged between a man and a woman, either verbally or in writing, expressed *per verba de presenti*, bearing that the parties consent to take each other for husband and wife, a marriage may be formed without any *copula* cohabitation, or celebration *in facie ecclesie*. Such mutual declaration of consent, whether oral or written, and however expressed, must unequivocally import immediate consent to hold each other thenceforth as man and wife. But as consent is the essence of the contract, it must be real. Words uttered in jest, or with a different object, cannot, whatever their literal signification, be obligatory.

3. Marriage may be established by public cohabitation as man and wife alone.(a)

*General Principles as to Constitution of Marriage.*—“Marriage is considered in Scotland as an ordinary civil contract, which is completed by the interposition of the consent of parties, provided this take place unequivocally, seriously, and deliberately, and with a genuine purpose immediately to establish \*the relation of husband and wife, and not to engage only, or betroth themselves to [ \*92 ] marry at some future time. That a marriage may thus be effectually made in Scotland without the form of celebration by a clergyman, and without the use of any precise ceremony or solemnity, even of a civil nature, and in any way wherein the explicit and mature consent of parties is gravely exchanged. That with respect to the evidence of the proper matrimonial consent having passed between the parties,

(y) Stair's Inst. b. 1, tit. 4, s. 4; Ersk. Inst. b. 1, t. 6, ss. 8, 9; 1 Hume's Crim. Law, 447; Bell's Principles of Law of Scotland, 419, 3d ed.

(z) Ersk. Inst. b. 1, tit. 6, s. 7; Ferguson's Cons. Law, 171; 1 Hume's Crim. Law, 449, 450; 2 Phil. R. 16; Bell's Principles of

Law of Scotland, 419, 3d ed.; Bayley v. Snell, 1 Sim. & Stu. 78; 5 Ves. 534 a, 2d ed. See post, Ch. III. a. 1, as to marriages within the prohibited degrees in England, and stat. 5 & 6 Will. 4, c. 54.

(a) See Cameron v. Malcolm, Mor. p. 12680; 2 Hagg. Conn. R., App. 17.



the practice of the law of Scotland is not limited by strict or scrupulous rules, but allows the fact to be vouched or inferred in sundry modes of evidence—by public cohabitation under the character, or, as it is termed, the habit and repute of man and wife—by writings of mutual acceptance as spouses *de præsenti*—by mutual written declarations or acknowledgments of marriage—by a series of letters, such as in their contents and mode of address and subscription either express or virtually imply an acknowledgment of marriage—by *verbal* declaration before a magistrate, or made on some suitable and serious occasion before credible witnesses called by the parties for that purpose. That whether the writings executed by the parties are in the form of mutual and present acceptance of each other as spouses, or in that of a declaration of marriage, as already made, is nowise material, for still such writings are evidence under the hand of parties, and to each against the other, that the just matrimonial consent has passed between them in substance though not in form; the voluntary execution of such declarations is a virtual consent of the parties as at that date to stand in the relation of married persons. That more especially regard is paid to declarations or acknowledgments of marriage, whether oral or written, where it appears that they have been followed with, or accompanied by the parties carnal knowledge of each other; not that such intercourse is regarded as the seal or accomplishment of the contract, or indispensable to its validity, but as a material ingredient of evidence to show that it was meant and understood between the parties that they were actually man and wife from that time, and not engaged or under promise only. That it is however carefully to be observed with respect to all these several [ \*93 ] modes of evidence, \*whether oral or written, that they are liable to be controlled and expounded by other writings, if such there be, of a contrary import, which have passed between the parties, or by facts and circumstances of a different tendency in the after-conduct and proceedings of parties, whereby it becomes necessary for the judge to take a complex view of the whole case, and to determine on the whole series of evidence and circumstances, whether by the writings and acknowledgments which passed between the parties, they did or did not truly intend to become man and wife, and did or did not consider themselves as being in that relation to each other. That among other circumstances which weigh in this point of view the absence of carnal intercourse is always one of some moment, but that although unfavourable to the plea of marriage, this circumstance is not of itself decisive, but may be made amends for by the other evidence in the case, and more especially where reasonable motives of prudence or the like can be assigned for such forbearance.”(b)

*Particular Instances of Irregular Marriages.*—By the canon law, the distinction between the contract *de præsenti* and the promise *de futuro* was well known; the former constituting a good marriage of itself, the other not, unless followed by *copula*, or some other act which is held in law to amount to the carrying the promise into effect. But if the contract *de præsenti*, as well as the promise *de futuro*, had

(b) *Evidence of D. Hume*, 2 Hagg. Cons. R., App. 64, 65; *Dodson*, Appen. 77, 78.

required the subsequent *copula* to give effect to the marriage, the distinction would never have been heard of; and with reference to this distinction it was decided, that a mere declaration of consent *per verba de presenti*, without any subsequent *copula* or cohabitation, constituted a valid marriage.

In *M'Adam v. Walker*,<sup>(c)</sup> Elizabeth Walker had cohabited with Mr. M'Adam and borne him two daughters. In the presence of several of his servants, whom he called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so he said, "This is my lawful wife, and these my lawful children." On the same day, \*with- [ \*94 ] out having been alone with Walker during the interval, he put a period to his existence. The House of Lords, on appeal, being of opinion that at the time of the above transaction Mr M'Adam was of sound mind, and that insanity was not to be inferred from the act of suicide, held, that a marriage *per verba de presenti* was constituted.

A verbal declaration by a man soon before death, to the minister and elders of his parish, that a woman was his wife who had borne children to him, and their living together as man and wife for years, were held to constitute a marriage.<sup>(d)</sup>

Continued presumed cohabitation of a man and his servant, letters addressed to her under the appellation of his wife, and valuable presents given to her by him with some other circumstances, were found to constitute a marriage.<sup>(e)</sup>

The case of *Dalrymple v. Dalrymple*,<sup>(f)</sup> was a suit for the restitu-

(c) 1 Dow. 148; 2 Hagg. Cons. R. 97.

(d) *Ballantine v. Wallace*, Halkerton's Digest of the Law of Scotland relating to Marriage, 433, pl. 2.

(e) *Ingles v. Robertson*, Mor. p. 12689.

(f) 2 Hagg. Cons. R. 54; Dodson, 1—66. The facts of the case are as follows:—In April, 1804, J. W. H. Dalrymple, of the age of 19, a cornet in the Dragoon Guards, being in Edinburgh with his regiment, and Johanna Gordon, a gentleman's daughter, above 21, became attached to each other, and entered into a mutual promise of marriage, without date, which was indorsed a "sacred promise," and left in her possession in these terms, "I do hereby promise to marry you as soon as it is in my power, and never marry another, J. D. I promise the same, J. G." On the 28th May, 1804, they signed the following declaration, "I hereby declare Johanna Gordon is my lawful wife; and I hereby acknowledge J. W. H. Dalrymple as my lawful husband." By another paper signed by both, and dated the 11th July, 1804, Mr. D. reiterates the above declaration, and promises that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power; and she promises "that nothing but the greatest necessity (necessity which situation alone can justify) shall ever force her to declare this marriage." The two last papers were inclosed in an envelope,

inscribed "sacred promises and engagements." In various letters produced, Mr. D. calls Miss G. his wife, and describes himself as her husband, speaks of her drawing on him for money, "for it is her right; calls her sister his sister, and alludes to our marriage." Mr. D. removed from Scotland to England about the 21st July, 1804. During his stay in Scotland, it was proved by servants that he was frequently admitted in the evening, by order of Miss G., to her father's house, when he went up stairs to the dressing-room adjoining the young ladies' bedroom; and on more than one occasion he was seen coming away from the house early in the morning. The terms of many of his letters to Miss G., during his stay in Scotland, apparently referred to a marital intercourse as taking place between them, and together with the other evidence, left no doubt on the mind of Ld. Stowell that the alleged marriage was consummated. Mr. D. remained in England till 1805, when he sailed for Malta, and remained abroad, with the exception of a month or two, till May, 1808. On his departure he wrote to Miss G. renewing his injunctions of secrecy as to the marriage; and a correspondence was subsequently kept up till the autumn of 1806, when he directed his friend and agent not to forward her letters to him, as he would not read them, and to intercept any letters she might write to

tion of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, whether by the law of Scotland a present declaration constitutes or evidences a marriage without consummation. The marriage *\*was* in Scotland, and [ \*65 ] one of the parties, an English gentleman, was not otherwise resident in Scotland than as quartered with his regiment in that country. Lord Stowell, after an examination of the decided cases in support and against the proposition, that a contract *de presenti* (either in the way of declaration or acknowledgment) constitutes or evidences a marriage, said, "It strikes me, upon viewing these cases, that such of them as are decided in the affirmative, have been adjudged directly upon this principle, and that where they have been otherwise determined, it turns out that they have rested upon specialties, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de presenti*. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when [ \*96 ] *\*case* upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add, that the lord chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principle, and have scrupulously guarded the expressions of the public judgments of the house against the possible imputation of admitting any contrary doctrine. Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe, to the principle which I venture to assume, that such continues to be the rule of Scotch matrimonial law, where it is not shown that that law has actually resiled from it—to the opinions of eminent professors of that law—to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*,) I think that,

General D, his father. On the death of the father in 1807, Miss G. asserted her marriage rights, and furnished Mr. D.'s friend and agent with copies of the above papers, which she denominated, according to the style of the Scotch law, her "marriage lines." Soon after his return, in May, 1808, Mr. D. consented to the strenuous advice of his friend, *Miss L. M.* In England according to established forms. Miss G. then finding

that Mr. D. was not amenable to the Scotch courts, proceeded in the Consistory court of London for restitution of conjugal rights, resting her claim on the above documents, on the defendant's letters, and on the evidence of the servants, as to a marital intercourse having occurred. The plaintiff's letters to the defendant were not put in by her, nor were they called for on behalf of the defendant.

being compelled to pronounce a judgment upon that point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de presenti* does not require consummation in order to become "very matrimony:" that it does, *ipso facto, et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and who wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation."(g)

*\*Promise of Marriage.*—A promise of marriage—the true *sponsalia* or the *sponsalia de futuro* of the canon-law [ \*97 ]—may, while things remain entire, be resiled from at any time, though the party guilty of a breach of promise, without any adequate cause, may be liable to damages at the suit of the party who is prejudiced by the non-performance.(h) If, however, the promise be followed with *copula*, it is, with an exception to be noticed, converted into an actual marriage, in consequence of the presumption arising from the fact of a consent to present marriage having been then interposed. The marriage being complete in this way, necessarily invalidates any other with third parties.(i) In England no such marriages are allowed; but an opinion is expressed, that if an individual, residing in that country, gave a promise of marriage, and afterwards came to Scotland, and had carnal connection with the woman, that the matrimonial tie would be complete. For it will be observed that the matrimony does not rest on the promise, but on the present consent, which is presumed from it, and attends the subsequent connection.(k) It has been held, that in order to establish a marriage by a promise and subsequent *copula*, that the promise must be proved by the writ or oath of the party whose promise is founded on.(l) But where the whole language of the letters which had passed between the parties, without containing any direct promise, could lead to no other inference than that the parties contemplated honourable connection and a future marriage, and was followed by carnal intercourse; the House of Lords affirmed the judgment of the court below, and declared the marriage valid by the law of Scotland.(m)

(g) *Dalrymple v. Dalrymple*, 2 Hag. Cons. R. 102—104; Dodson, 56, 57, affirmed by Deleg. 19th Jan. 1814.

(h) 1 Stair's Inst. p. 28, n. by Brodie. See *Hogg v. Gow*, 27th May, 1812, Fac. Coll. The stat. 59 Geo. 3, c. 35, s. 1, enacts that all actions of damages "on account of breach of promise of marriage, seduction or adultery," shall be forthwith remitted to the jury court without undergoing any discussion in the court of Session.

(i) *Pennycook v. Grinton*, Mor. p. 12677; 1 Stair's Inst. p. 28, n. by Brodie.

(k) 1 Stair's Inst. p. 28, n. by Brodie; Ersk. Principles of Law of Scotland, 68, 11th ed.

(l) *Smith v. Grierson*, Mor. p. 12391.

(m) *Honyman v. Campbell*, 2 Dow & Clark, 265; 5 Wils. & Shaw, 92; 8 Shaw, D. & B. 1039. It is said to be a question as yet undecided, whether promise with *copula* so constitutes a marriage *ipso jure* that it may be insisted on in prejudice of a second marriage; Bell's Principles of the Law of Scotland, p. 417, 3d ed.

[ \*98 ] \*It was said that by the law of Scotland, if the wife of the first private marriage chooses to lie by, and suffer another woman to be trepanned into a marriage with her husband, she may be barred *presonali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of England: no connivance would affect the validity of her own marriage: even an active concurrence on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. Lord Stowell thought that no such rule was ever admitted authoritatively as the law of Scotland; and that the doctrine of a *medium impedimentum* was this, that on the factum of a marriage, questioned upon the ground of the want of a serious purpose, and mutual understanding between the parties, or indeed on any other ground; it is a most important circumstance in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part.(n)

A man and woman had sexual intercourse together, and after this had continued some time, the man granted and delivered a letter to the woman, which if it did not contain a *de presenti* matrimonial consent, at least contained a promise of marriage, and was so understood by the woman; this was followed by the renewal of sexual intercourse; the case was in many respects affected with specialties. It was held that there were no circumstances to exclude the rule that marriage is contracted by a promise of marriage *copula sequente*, and that the parties were accordingly married. It was observed, that after marriage has been contracted by previous and subsequent *copula*, it was not in the power of the woman to divorce the marriage relation by releasing the man from his promise, even had she agreed to do so.(o)

It is not necessary to prove the contract of marriage *per verba de presenti*, it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a Scotch marriage.(a) A promise of marriage *cum subsequenti copula* is sufficient; and it seems that the release of the promise of marriage intervening between the promise and a subsequent *copula* would revive the promise and repeal the renunciation.(b)

[ \*99 ] \*4. OF MARRIAGE BY HABIT AND REPUTE.

A marriage may also be constituted in Scotland by a train of cohabitation as married persons, and being publicly held and reputed

(n) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 129, 130; *Dodson*, 88, 89.

(o) *Craigie v. Hoggan*, 16 Dunl. B. & M. 584.

(a) *Hoggan v. Craigie*, 1 Mac. & Rob. 942; 15 Dunl. B. & M. 379; 16 Id. 584.

(b) *Ibid.* See *White v. Hephurn*, Mor. Dict. 12. 666; *M'Dowall*, *Ferguson's Cons. Law*, (1829) 167—178; *Shillingbeer v. McIntosh*, 7 Shaw & D. 533; *M'Kinnon v. Sandys*, *Miles v. Sim*, 8 Shaw & D. 69.

to be such, which from the acknowledgment implied in these circumstances establishes a presumption, that an actual marriage has intervened; a presumption, like all others, capable of being refuted by contrary evidence. Cohabitation as man and wife does not in England constitute a marriage, but as it may create a presumption of a previous celebration, it is a general rule of the law of England, that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage.(p) In judging from the nature of a connection, whether illicit or not, the question must in some degree be affected by the mode in which it originated. The prima facie presumption is in favour of the legality of the connection, but if it clearly appears to have been at first illicit, the presumption is that it has so continued.(q) A distinction therefore has been made between cases where the parties have been reputedly married from their first connection, and those in which it has commenced illicitly. In the first, the reputed cohabitation is sufficient; in the last, the presumption is that the parties continue to cohabit illicitly, and it is necessary to prove in some other way that they really regarded each other as man and wife.(r) For, as observed by Lord Eldon, it is one thing to say, that being in habit and repute man and wife, should be evidence of a marriage, and another thing to say, that it should be held as constituting, or admitted as incontrovertible proof of, a marriage, even though it should be shown that there was in fact originally no marriage.(s) With respect to the constitution of marriage by cohabitation, with habit and repute, it is to be observed that repute alone cannot make or prove a marriage, but there must first be cohabitation as husband and wife, such as belongs to the state of matrimony, which is the basis of the proof of marriage, the reputation following from it being but an adjunct to prove the character of the cohabitation.(o)

A man may occasionally allow a woman to bear his name, or even to have the appearance of being his wife, without her being so.(t) Where there has been no regular marriage, \*cohabitation [ \*100 ] must be of such a character as to lead to the conclusion that the parties cohabited as man and wife. A man's allowing a woman to take the station, and be called his wife, is a constant and continued declaration of consent. And after this has gone on for a considerable time, is sufficient proof that they were married. The evidence of consent was considered irresistible in a case where the woman was respectable. The parties had courted for two years on the perfect understanding that they were to be man and wife. She was so hurt at not being regularly married, that she refused to have any further connection with him; and then, in the presence of persons respectable in their station of life, they were bedded, and the witnesses called on to declare them man and wife. The inference in favour of the marriage was strongly corroborated by the man's

(p) Stark. on Ev. 939, 1st ed.

(q) *Cunningham v. Cunningham*, 2 Dow, 501, 502.

(r) *Sommerville v. Halero*, Mor. p. 12635;

*Swinton v. Kailles*, Mor. p. 12637; *Inglis*

*v. Robertson*, Mor. p. 12689; *Macneil v.*

*Macgregor*, 1 Dow & Clark, 208; 2 Bligh, N.S. 480; 3 Wils. & Shaw, 85.

(s) 1 Dow, 134.

(t) *Lowrie*, 2 Dunl. B. & M. N. S. 953.

(t) *Thomas v. Gordon*, 7 Shaw & Denl.

872; *McInnes v. More*, Mor. 12683.

father and mother being in the house at the time, and their visiting them immediately afterwards as man and wife. During their whole cohabitation they were considered married persons, and associated with as such; and there was more than one instance of direct acknowledgment of her as his wife.(u)

In proof of a marriage by habit and repute, the general reputation among the friends, relations and families of the parties is to be received.(w) A divided repute is no evidence at all on the subject of marriage. It must be founded on general not on singular opinion. And where the evidence is contradictory, the collateral circumstances, in which there can be no error, ought to be considered.(x) Continued cohabitation is essential to found a marriage on habit and repute, and such a marriage may be negatived by the character of the woman and the scandalous way in which the parties lived.(y) Although it is by no means impossible to make out a marriage by repute and cohabitation as man and wife in Scotland, which will put an end to an English marriage taking place afterwards, yet there must be very pregnant circumstances. In a declarator of legitimacy by a child born of a connection in Scotland, against the representatives of her father, [ \*101 ] deceased, \*who subsequently contracted a regular marriage in England, and after having children by the latter marriage, became domiciled and died in Scotland, his wife continuing to live in England; it was held first that the English marriage was no bar to an action proceeding on the allegation of a marriage effectually, though irregularly, constituted by the law of Scotland; and might be put an end to by proof of such Scotch marriage; second, that it was not incumbent on the pursuer to call the English wife as a party to the process; third, that in the circumstances of the case the pursuer had failed to establish a marriage between her parents.(z)

It was decided by the House of Lords that cohabitation in a foreign country (Isle of Man) as husband and wife, was insufficient to constitute marriage in Scotland. The reason of this is, because by the laws of the Isle of Man habit and repute do not constitute marriage, and that such cohabitation should take place in this country where the law exists.(a)

By the law of Scotland, a marriage by habit and repute, not objected to during the husband's lifetime, is sufficient to entitle the wife to her tierce or thirds.(b) But the Scotch statute(c) against bigamy only applies to marriages celebrated *in facie ecclesiæ*.

##### 5. OF THE EVIDENCE OF INTENTION OF PARTIES CONTRACTING.

The marriage contract must be deliberate, but it is implied in all contracts that the parties have taken such time, be it more or less, as they thought necessary, for no particular time for deliberation is assigned

(u) *Elder v. McLean*, 8 Shaw. D. & B. 56.

(w) *Thomas v. Gordon*, 7 Shaw & D.

872.

(x) *Cunningham v. Cunningham*, 2 Dow,

511.

(y) *Farrel v. Barrie*, 6 Shaw & D. 472;

*Adair v. Adair*, 7 ib. 597.

(z) *Wright v. Wright, Trustees*, 15 Dunl.

B. & M. 767.

(a) *McCulloch v. McCulloch*, Fac. 10 Feb.

1759; Mor. 4591; see ante, p. 62.

(b) Stat. 1503, c. 77,

(c) 1551, c. 19.

for that contract, any more than for any other. So like all other contracts it must be serious, not the sports of an idle hour, mere matters of pleasantry and badinage never intended by the parties to have any serious effect whatever; at the same time it is to be presumed that serious expressions applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed *a priori*, that \*a man is sporting with [ \*102 ] such dangerous play-things as marriage engagements. So again, the intention of the parties is to be regarded, for that is the substance of the contract, and what is beyond or adverse to it does not belong to it. But then the intention is to be collected (primarily at least) from the words in which it is expressed, and in the English law it is almost exclusively to be so collected. In all other countries a solemn marriage *in facie ecclesie facit fidem*, the parties are concluded to mean seriously, and deliberately and intentionally what they have avowed in the presence of God and man, under all the sanctions of religion and of law. But by the matrimonial law of Scotland a greater latitude is allowed, and the parties are at liberty to show another intention than that which the words express, and that, by virtue of a private understanding between them, this apparent marriage was mere imposition and mockery, without being intitled to any effect whatever. But still it lies upon the party who impeaches the intention expressed by the words to answer two demands, which the law must be presumed to make upon him; he must assign and prove some other intention; and secondly, he must prove that the intention so alleged by him, was fully understood by the other party to the contract at the time it was entered into, for it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted.(c)

*In the case of Irregular Marriages in Scotland, the prior as well as the subsequent Facts and Circumstances may be looked at.*—In the case of irregular marriages in Scotland, it is the practice and it is the law of the country, to take evidence of all the facts and circumstances antecedent to the alleged ceremony, and all the facts and circumstances of the conduct of the parties subsequently to the ceremony; and that, from a complex view of all these circumstances, an inference is to be drawn, whether that real and deliberate consent was given which constitutes marriage; and in doing this, [ \*103 ] \*resort is not to be had to the conduct of the parties subsequent to the ceremony, for the purpose of undoing a marriage contracted, but for the purpose of learning whether the parties did or did not, by their conduct, exhibit a conscious feeling that no such ceremony had taken place between them as was sufficient to lead them, in their own minds, to the conclusion that they were married persons.(d)

(c) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 106, 107; *Dodson*, 60—62. (d) *Macneill v. Macgregor*, 2 Bigh, N. S. 469, 470.



*Instances where Marriages were not constituted.*—Although by the law of Scotland consent alone is necessary to constitute a marriage; yet that consent must be deliberately given by both parties *eo intuitu*. If either of them have any other purpose in view than that of marriage, and this be clearly established, then the consent will not be of that nature which is required by law. Therefore the mere granting of a power of attorney by a man in France, to a woman in Scotland, with whom he had cohabited, for enabling her to transact his affairs in Scotland, and allowing her to assume the character of wife, was held not to constitute a marriage.(e)

A long correspondence, in which the parties styled each other husband and wife, and a declaration of marriage before witnesses, was found insufficient to constitute a marriage, where there was no consummation, and it appeared that at the time of the declaration, the alleged husband had resolved never to cohabit with the person he declared to be his wife.(f)

As the law of Scotland requires no definite form for the constitution of marriage, it becomes necessary to attend to the views of the parties in each case. A holograph letter discovered in a gentleman's repositories at his death, in which he declared himself the husband of his house-keeper, who had long cohabited with and borne children to him, was held not to be sufficient evidence of marriage, for the letter, while it remained in his possession, was revocable and bound neither party.(g) A letter addressed by the man to a lady with whom he had inter-  
[ \*104 ] course, "acknowledging her as his lawful \*wife, with liberty for her to use his name, though for particular reasons he wished the marriage to be kept private for some time;" was held not to be sufficient proof of any marriage or matrimonial contract having passed between the parties. In this case the acknowledgment was signed not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The commissioners and the court of session had found the facts relevant to infer a marriage, but the House of Lords considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.(h) A. formed an illicit connection with B. by whom he had two children. More than four years after the birth of the younger child he addressed the following holograph letter to B. "My dearest Mary, I hereby solemnly declare that you are my lawful wife, though for particular reasons, I wish our marriage to be kept private for the present. I am your affectionate husband." This letter was, at or about its date, delivered by A. to his agent, who preserved it till A's death. A. continued to cohabit with B. till his death six years thereafter, and had two other children by her. The court being of opinion that it was proved that the above letter was written to please and satisfy her,—that she was aware of

(e) *Sassen v. Campbell*, 3 Shaw & Dunlop, 159; *Campbell v. Sassen*, 2 Wils. & Shaw, 309.

(f) *Maclauchlan v. Dobson*, Mor. p. 12693.

(g) *Anderson v. Fullerton*, Mor. p. 12690.

(h) *M'Innes v. More*, Mor. p. 12683; 2 Hagg. Cons. R. 101.

its existence and import before or at its deposition with the agent,—and that it must be held to have been delivered to him as her agent also,—held that a marriage was constituted between A. and B. and that the children, in consequence, must be assolzied (freed from) the conclusions of a declarator of illegitimacy, brought by A.'s heir at law.(p)

The case of *Macgregor v. Campbell*(i) is a very strong case. It appears that Captain Campbell, an officer in the army, formed a connection with a woman who was cohabiting with him; that he admitted his brother officers and their wives to visit her as his wife, and that she was by habit and repute received as such; but on the validity of this marriage being challenged, it appeared that this woman had actually received wages, and livery meal, which is board wages, according to the language of Scotland; that she displayed herself not as acting in the capacity of wife, but in that of a servant. Upon that evidence the inference from other facts was rebutted, and it was declared that the marriage was invalid, because she continued to accept the wages which she had been in the habit of receiving antecedently. In another case it appeared that the parties exchanged mutual declarations, such as, if it had not been for their conduct either before or after the time of marriage (which the court always takes into consideration, pronouncing upon a complex view of the whole case,) would in their judgment have constituted a marriage in the law of Scotland. The writings they interchanged were to the following effect. The lady signed this: "Skirling Mill, February the 16th, 1779. I hereby solemnly declare you, Patrick Taylor, in Brickenshaw, my just and lawful husband, and \*remain your affectionate wife." He on his part signed a similar paper, and [ \*105 ] signed himself her affectionate husband. An action of declarator having been brought in the court below, the marriage was held to be valid; and on appeal to the House of Lords, it appearing that at the time of the interchange of those letters, there was an understanding, which was inferred from the conduct of the parties, that those letters were to be given up on demand, that house reversed the interlocutor of the court below, and found that there was no marriage. In this case there was no evidence of consummation.(k)

So a marriage was held not to be solemnized where there were no circumstances established on which a presumption could be founded that at the time of the irregular ceremony any real consent was given by the parties. And from the evidence adduced, it appeared that there was no reason to believe either that a free, deliberate, voluntary, solemn consent had been given to constitute immediately the relation in law of man and wife, or that there had been any consummation.

In May, 1816, a marriage ceremony between M. and G. (according to the evidence of one witness, who spoke positively to the performance of the ceremony, and the identity of the parties, confirmed by another witness who spoke with less firmness as to the identity,) was performed by a minister of the church of Scotland, upon the produc-

(p) *Hamilton v. Hamilton*, 22 Nov. 1839, 480.  
Fae. Coll. No. 12, p. 75.

(k) *Taylor v. Kello*, Mor. 12687-12689,

(i) Mor. p. 12697; cited 2 Bligh, N. S. cited 2 Bligh, N. S. 479.

tion of an instrument purporting and proved to be a certificate of a proclamation of banns, which proclamation, from the date of the certificate as compared with a registration of the marriage, and the evidence of the witnesses, could not possibly have been made. But it was proved to be the usual certificate, and that, according to the practice in Scotland at the time, banns were in fact scarcely ever proclaimed when such certificates were given. The minister who performed the ceremony had afterwards been banished for forgery, and collusion in effecting a marriage, and became incompetent to give evidence; but a book kept by him, in which the marriage in question [ \*106 ] appeared to be \*regularly entered, was produced, and proved by the wife and daughter of the minister, who also proved the performance of the ceremony.

M., who had afterwards married another husband, upon a suit to establish the first marriage, in her defence admitted, that one evening in May, 1816, by means of threats, and particularly of personal injury to a rival suitor, who afterwards became the second husband, she was induced to go, and went with G. to the house of the minister before mentioned, but from the agitation of her mind that she was incapable of paying attention to what then passed, and was convinced that she did not consent to the marriage. She also admitted, that after the ceremony she returned with G. to her father's house, but denied the consummation. It was in evidence that M. was in the habit of calling upon G. at his printing office late in the evening, and alone; and that after the ceremony of the marriage, in speaking of it, she said it was not binding: "what would two or three words of an outlawed man do?" It was also in evidence that, on two occasions, in the presence of her father, she was addressed and her health drank by the name of Mrs. G., which salutation was in one instance returned, and another received, without observation by her or her father. It was also in evidence, that upon two occasions, I., the second husband, after his marriage, came to the house of M. when G. was there, and went secretly to an upper room, where he remained alone.

The marriage with G., as alleged, took place in May, 1816. In June, 1816, a marriage was regularly solemnized between M. and I. It was proved that G., before his alleged marriage with M., had admitted that I. was a more favoured suitor; that upon the marriage between M. and I. he had accepted a present of a pair of gloves; that he had frequently been present in social parties with I. and M., to whom he drank by the name of Mrs. I.; that he slept in the same room where M. and I. were in bed together as man and wife; and in all his intercourse with them, which was frequent, recognized them as such.

Two years after the marriage of M. and I., and their cohabitation, [ \*107 ] G. raised an action in the Commissaries' Court \*against M., of declarator of marriage and adherence. There was issue of the marriage between M. and I., but neither the children nor I. were made parties.

It was held by the House of Lords (reversing the judgment below); that if a celebration of the ceremony of marriage took place between M. and G., it was to be presumed from the conduct of the parties *before the ceremony*, from the circumstances proved at the time of

the ceremony, and from the conduct of the parties subsequently, that no real consent to marry was given.(l)

#### 6. MARRIAGES OF ENGLISH PARTIES IN SCOTLAND.

Parties may go out of England and marry by necessity or choice; in either way a foreign marriage is not void upon that account by the laws of England. The marriage acts(m) are confined to England; consequently, marriages in Scotland remain in the same state as if those acts had not passed.

It is well known that so much of the marriage acts as prohibits the marriage of minors, without the consent of parents or guardians, is frequently evaded, by the parties going into Scotland to be married, and returning into England immediately afterwards. The validity of such marriages was once questioned by high authority;(n) for though in general marriages are governed by the law of the country in which they are celebrated, yet it was doubted whether the *lex loci* ought to be applied in a case accompanied [ \*108 ] with circumstances so strongly marking the intent to evade the law of England.

The validity, however, of a marriage contracted in Scotland by English subjects, according to the law of that kingdom, is now fully established, although the marriage would be invalid according to the law of England, and notwithstanding the parties had acquired no bona fide domicile in Scotland, but had resorted thither for the purpose of making a contract, which, if they had remained in England, they were prohibited from making. Thus it was decided, on appeal to the delegates, that a marriage in Scotland between two English subjects, one of whom was under age, and had eloped without the consent of her guardians, was a good marriage.(o)

(l) *Macneil v. Macgregor*, 2 Bli. N. S. 470; 1 Dow & Clark, 208; 3 Wils. & Shaw, 85.

In this case two questions were raised as to the admissibility of evidence:—1st. Whether, according to the law of Scotland, entries made in a book kept by a minister of the church of Scotland, in the manner above described, are admissible in evidence to prove a marriage; and how marriages are to be proved, supposing the minister and witnesses to be dead or incompetent?

2d. Whether the admissions of a woman who may be claimed as a wife by two persons, under such alleged ceremonies of marriage and circumstances as above stated, is admissible in evidence as proof of the first marriage?

Another question was, whether a marriage celebrated by a minister of the church of Scotland, upon such certificate as above mentioned, without actual publication of banns, is to be deemed, according to the practice, a regular marriage in Scotland.

(m) 26 Geo. 2, c. 33, s. 18; 4 Geo. 4, c. 76, s. 33; 6 & 7 Will. 4, c. 85, s. 45.

(n) Lord Mansfield, 2 Burr. 1079. In *Phillips v. Hunter*, 2 H. Bl. 412, Eyre, C. J.,

said, that Lord Mansfield failed altogether in the proposition that British subjects should not be allowed to contravene the statute law of the land as to marriages, by withdrawing themselves from England.

(o) *Crompton v. Bearcroft*, Arches, 16th of February, 1767; Delegates, 4th of February, 1769. The facts of this case appear by the libel, which pleaded the marriage act, and the minority of the lady, and want of consent, and that “on the 13th of March, 1762, a marriage was had and performed in the dwelling-house of Thomas Huddleston, cook and confectioner, at Dumfries in North Britain, by Richard Jameson, the minister (or pretending himself to be the minister) of the English chapel at Dumfries, who then lodged in the house of Thomas Huddleston, in whose lodging-room the marriage was so performed between Edward Bearcroft of Droitwich, in Worcestershire, and Maria Catherine Compton, of Hartpur, in Gloucestershire, without publication of banns, and without any license being had and obtained for the solemnization of the said marriage from any person having authority to grant the same; and that neither Edward Bear-

[ \*100 ] \*The principle of this decision has been referred to different grounds. It is said, "that determination passed, not on the ground that the marriage was valid in Scotland, and that, therefore, it was good—nothing was laid before the court to show that the marriage was valid in Scotland—but because the act of parliament did not put any restraint upon *English* subjects being married in *Scotland*, with respect to the consent of parents. On that ground it is that those marriages are held good, not being contrary to the law of England. The same holds as to marriages beyond sea; for English subjects going abroad, or to Scotland, to marry English subjects, have an exemption from that restraint in the act." (p) In another case it is said, that the case was decided by the Court of Delegates upon different grounds from those which were taken in the Court of Arches, and because the marriage was a good marriage in Scotland: and if all the facts pleaded in the libel were proved, the marriage could not be pronounced void under the marriage act; in which it is expressly declared, that it shall not extend to Scotland. On these grounds the delegates rejected the libel; the case of that marriage, therefore, was determined by the *lex loci*. Those persons having gone to Scotland, and been married in a way not good in England, but good in Scotland, and not affected by the marriage act, were considered to have contracted a valid marriage. (q)

It was observed by Lord Brougham, that the judges both of the consistorial and common law courts have held, that a Scotch marriage contracted by English parties in the face and in fraud of the

[ \*110 ] English law is valid to all intents and purposes, \*and carries all the real and all the personal rights of an English

croft nor Maria Catherine Compton ever was resident in any part of North Britain. But she the said Maria Catherine Compton, in the beginning of March, 1761, went from the house of John Dalby, her testamentary guardian, in Berkshire, to pay a visit to her brother, Sir William Compton, at Henslip, in the county of Worcester, and he dying, she left that place and went to her mother at Hartbury, in the county of Gloucester, and from thence went, unknown to John Dalby, and without his consent, and without the knowledge of her other testamentary guardians, with Edward Bearcroft, on or about the 6th of March, 1762, to Dumfries to be married, and that they were married there as aforesaid merely to evade the laws of this realm, and returned into England on the same day, and proceeded to the house of Edward Bearcroft at Droitwich, and were never in North Britain but during the time of the journey and for the purpose of the marriage. The certificate of the marriage was also pleaded in these words: 'I certify that I married, after the manner of the Church of England, Edward Bearcroft and Maria Catherine Compton. (Signed) J. Jameson, minister of the English chapel at Dumfries.' The prayer of the libel was, that the marriage might be declared null and void, according to the said act for clandestine

marriages." 2 Hagg. Cons. R. 444, 445, n. It appears from the imperfect account which remains of the argument in this case, that soon after the marriage act many instances had occurred of persons going into Scotland to evade the restrictions of that act. The cases of *Bedford v. Varney*, 1762, before Lord Northington, and *Brook v. Oliver*, at the Rolls, before Sir Thomas Clarke, 1759, were mentioned, being cases of bequests dependent on the validity of such marriage, in which it had been contended, that the marriage was not valid; but the objection was overruled, and the points in those causes adjudged accordingly. It was said also, that Lord Northington must have been well acquainted with the spirit and intention of that act, as he had been much concerned in procuring it. The notion of impeaching these marriages on the ground of evasion, stated in the libel of *Compton v. Bearcroft*, is supposed to have proceeded from the observation of Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1079; 1 W. Bl. 234; as to the exception that might be admitted on that principle, as suggested by Huber de Conflictu Legum, p. 538; see 2 Hagg. Cons. R. 376, 377.

(p) Per Sir Geo. Hay, 2 Hagg. Cons. R. 439.

(q) Sir W. Wynne, 2 Hagg. Cons. R. 442, 444.

marriage, affecting, in its consequences, land and honours, and duties and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to own ritual, and under our own statutes.

It is firmly established and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to a Scotch border and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the marriage state.(r)

In Gretna Green marriages by English parties, whose domicile continues in England, the statute law of their own country is disregarded, such marriages taking place without form or solemnity of any kind, except a mutual declaration of consent by the parties before witnesses. The validity of these marriages is referred to the principle, that a marriage solemnized according to the rule of the place of celebration, however peculiar that municipal rule may be, is by the law of nations valid in all other countries. In other words, like every other contract *juris gentium*, marriage, wherever celebrated, has the same consequences and effect in any other country, to the law of which the married persons might afterwards be subject, as if it had been celebrated under that law.(s) And it is said, that if persons have the free choice of the place where they reside or travel, or perform any act, they are guilty of no fraud against the law of their own country, when they avail themselves of an opportunity [ \*111 ] of going to another civilized country to constitute the relation of husband and wife, in the manner and according to the rights allowed to persons the subjects of that country; all that such persons do is to prefer in this matter the law of Scotland to the law of England; and in so doing, they do no wrong; they merely *utuntur jure suo*; and accordingly this is now the settled law of England, which proves that no domicile is required to constitute in Scotland the relation of husband and wife among foreigners, who have just arrived there before celebrating their marriage, and which, nevertheless, is adjudged to be good and effectual all the world over.(t)

It frequently happens that parties who have gone to Scotland to be married, are married again in England. The purpose of such second marriage is to satisfy all the friends and connections, as well as the parties themselves, that the holy estate of matrimony has been effectually and properly contracted. Another purpose is, that of giving

(r) *Warrender v. Warrender*, 2 Clark & Finn. 542, 550. In the year 1835 Lord Brougham introduced a bill (which did not pass) in the House of Lords, which had for its principal object to prevent a Scotch marriage from operating differently from an English marriage, by providing that no marriage contracted in Scotland shall be valid either in Scotland or England, unless both parties are Scotch by birth, or are domiciled

in Scotland, that is, usually reside there, or live in Scotland for three weeks next preceding the marriage. See Lord Brougham's Speeches, vol. iii. p. 440, 441, 459, 471; Hans. Parl. Deb. vol. xxx. 3d ser. pp. 1307—1313.

(s) See Fergusson's Rep. 222, 223, 464; post, sect. 8.

(t) Fergusson's Rep. 64, 65; see *Harford v. Morris*, 2 Hag. Con. R. 423.

ease and happiness to the minds of the parties themselves.(u) Assuming, however, the marriage in Scotland to have been valid, its re-celebration in England has no legal effect.

In *Ex parte Hall*,(x) the parties, both infants, eloped to Scotland, and married there without the consent of their fathers, according to the laws of Scotland. Previously to the re-celebration of the marriage in England, the fathers of the married couple mutually agreed to make settlements upon their two children. In consideration of an annuity agreed to be settled by the husband's father, the wife's father, being then solvent, entered into a bond for securing to his daughter an annuity, which was regularly paid until a short time before he became a bankrupt. On a petition presented by the husband to prove under the commission the value of the annuity, Lord Eldon declared that the settlement, after the marriage in Scotland, not being antenuptial, the re-celebration of the marriage in England could not support the bond as given for a valuable consideration; but, as it appeared [ \*112 ] that the husband's father had, in fact, agreed to make a provision for his son at the time the bond was given, such agreement would sustain the bond, although, in fact, the latter provision was not made until after the bankruptcy.(y)

*Evidence of the Marriages of English Parties in Scotland.*—Certificates are in many cases admitted as evidence, on the ground that they are made by persons in official situations intrusted with authority for the purpose. The certificate of a private individual, without any designation of character or office, is not admissible, on the broad principle that, *in judiciis non creditur nisi juratis*, therefore the certificate of a person before whom a Gretna Green marriage has been solemnized, is not admissible evidence in England of a marriage in Scotland.

In a suit of nullity of marriage, the libel pleaded a marriage between the parties at Gretna Green, in Scotland, and that the said parties then and there acknowledged each other as husband and wife respectively, in the presence of divers credible witnesses, who, together with the said parties, signed their names to a "certificate" of the said marriage, which was also pleaded and annexed to the libel, as the identical certificate. The court observed, that although the certificate, from the libel not having been objected to, remained as an exhibit in the cause, and claimed as such to be noticed by the court, yet the certificate was not any proof whatsoever of a marriage between the parties. Even the certificate of the king himself, under his sign manual, is, it is well known, no evidence of a mere fact,(z) much less a certificate of a private individual, without any designation of character or office.(a)

(u) 2 High, N. B. 501.

(x) 1 Ves. & B. 112; 1 Ross, 30.

(y) That a settlement made after marriage, for a valuable consideration, will be good, see *Jones v. Marsh*, For. 64; *Ramsden v. Hyllon*, 2 Ves. sen. 304; *Russell v. Hammond*, *Thorn v. Jones*, 1 Atk. 13, 190.

(z) See *Omichund v. Barker*, Willes, 550; see Hob. 213.

(a) *Neukes v. Milward*, 2 Addams, R. 386;

*Owen v. Spence*, *Compton v. Bearcroft*, cited 2 Addams, R. 392, 3. In the first case, the 4th article of the libel pleaded that a marriage between the defendant (then and still Rosa Milward, wife of L. J. Milward, but passing by the names and description of Rosa Haden, widow,) and the plaintiff, was had and solemnized, or rather *prophaned*, at Gretna, in the parish of Springfield, in the shire of Dumfries, and in that part of the

\*Although such a certificate cannot be exhibited as a proof of an alleged marriage, yet it may be offered to the court as a constituent either wholly or in part of the marriage, and be used as a declaration, under the hands of the parties, of their mutual acknowledgment of each other as husband and wife. Such a certificate, if set up as a constituent of the marriage, must be pleaded as such, with an averment to be sustained by evidence, that such was its effect by the laws, immemorial usages, and customs of Scotland. (b)

united kingdom called Scotland, on or about the 24th day of October, 1822, and that they the said parties then and there acknowledged each other as husband and wife respectively, in the presence of divers credible witnesses, who, together with the said parties, signed their names to a "certificate of the said marriage." And it then pleaded, in the 5th article, a certain paper writing, or exhibit, annexed to the libel, to be and contain that identical certificate. The exhibit in question was as follows:—"Kingdom of Scotland, county of Dumfries, parish of Gretna: These are to certify, to all whom it may concern, that John Nokes, from the parish of Chatham, in the county of Kent, and Rosa Haden, from the parish of St. Maries, in the county of Nottingham, being both here now present, and having declared to me that they are single persons, but have now been married conformable to the laws of the Church of England, and agreeable to the Kirk of Scotland. As witness our hands at Springfield, this 4th day of October, 1822. Witness me, David Lang; John Nokes, Rosa Haden. Witness, Jane Rae, John Ainslie."

(b) *Montague v. Montague*, 2 Addams R. 375, which was a suit of separation *a mensa et thoro* by reason of adultery. The first article of the libel, as reformed, pleaded that by the laws, immemorial usages and customs of Scotland; a valid marriage between a man and a woman may, by their consent *per verba de presenti*, be contracted by them in that kingdom, such man and woman being respectively above the age of pupillage, which by the law of Scotland is the age of fourteen years in males, and twelve years in females, without any banns published or license had, and without the intervention of any religious ceremony; and that the acknowledgment by the parties of each other as husband and wife, and their public cohabitation as such, is by the laws, usages, and customs aforesaid, presumptive proof that such parties are validly married; and the same is taken to be conclusive evidence of their marriage, unless it be distinctly proved that they did not intend to contract marriage; and that no consent of parents or guardians is necessary to the validity of a marriage between persons both above the age of pupillage, by the laws, usages and

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customs aforesaid. The second article; that in the months of August, September, &c. all, some, or one of them, G. C. Montague, then a bachelor, aged twenty-seven years, and free from all matrimonial contracts and engagements, paid his addresses to M. G. Wilson, then a spinster, aged seventeen years, and free from all matrimonial contracts and engagements; that they the said parties mutually agreeing to become husband and wife, went to Scotland for the purpose of intermarrying there; and on the 29th day of December, 1803, in the presence of divers credible witnesses, at Gretna Green, in the kingdom of Scotland, mutually acknowledged each other to be husband and wife, and were validly joined together in matrimony by Joseph Paisley, who upon that occasion read in the presence of the said G. C. Montague and the said M. G. Montague, formerly Wilson, the office for matrimony contained in the liturgy of the church of England, as by law established; and that the marriage so had and celebrated was and is a valid marriage according to the laws, immemorial usages and customs of Scotland. The fifth article of the libel pleaded, that the parties consummated their said marriage, and lived and cohabited together in Scotland (at Edinburgh) as husband and wife, till the end of March, 1804, during which time they constantly owned and acknowledged each other as husband and wife, and were commonly accounted, reputed, and taken to be such by and amongst their friends, acquaintance, neighbours, and others. And the eighth article pleaded, that at the time of the marriage of the parties pleaded as above, he the said G. C. Montague obtained a paper-writing purporting to be a certificate of his said marriage, from Joseph Paisley, the person who celebrated the same at Gretna Green aforesaid; which said paper-writing he, the said J. C. Montague, preserved and hath frequently shown to divers persons of credit and reputation, upon one occasion as lately as in the month of May, 1823; and that the said paper-writing was still in the custody, power or possession of the said G. C. Montague. It was objected that the eighth article pleaded *sub modo* a certificate inadmissible in evidence; and *Nokes v. Milward*, 2 Addams R. 386, ante, 112, was cited, in which a similar certificate



[ \*114 ] \*Evidence of the law of Scotland with respect to a marriage must be derived from a person of competent knowledge on the subject. Upon a prosecution for bigamy, where the first marriage was at Gretna Green, in Scotland, the court refused to receive evidence of the law of Scotland, in respect of the legality of such a marriage, from a witness who was a tobacconist.(c)

In a case where the validity of a marriage in Scotland was in question, and the authorities to which the learned judge, Lord Stowell, had been referred, were of three classes,—first, the opinions of learned professors, given in the present, or similar cases; secondly, the opinions of eminent writers, as delivered in books of great legal credit [ \*115 ] and weight; and \*thirdly, the certified adjudication of the tribunals of Scotland upon these subjects,—his lordship said, “I need not say, that the last class stands highest in point of authority; where private opinions whether in books or writings, incline on one side, and public decisions on the other, it will be the undoubted duty of the court, which has to weigh them, *stare decisis*.”(d)

Where a question in chancery is to be decided with reference to the law of Scotland, that law must be ascertained upon a reference to the master to inquire into and state it as a fact for the information of the court.(e)

In *Grierson v. Grierson*.(f) where the validity of the marriage of a ward of the court of Scotland was doubted, it was referred to the master to see if any marriage had been rightly celebrated, and to state the circumstances. That court in this case acted upon certificates of Scotch law, finding a marriage valid which was founded upon a present contract, without reference to any act of consummation.(g)

In the case of a criminal prosecution of a woman who had received a pension as an officer's widow, and it was alleged in the indictment that she never was married to him; she alleged a marriage in Scotland, but that she could not compel her witnesses to come up to give evidence. The court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the court of Session, or any of the barons of the court of Exchequer in Scotland, and that the depositions so taken should be read at the trial.(h)

had been rejected. Sir Christopher Robinson, taking the paper as a declaration, under the hand of the parties, of their mutual acknowledgment of each other as husband and wife thought it admissible, in that character, in conjunction with the facts and the law pleaded in this allegation, and consequently that this article of the plea was entitled to stand, subject to any objection to be taken by the husband to the instrument in a future stage of the cause. To this plea as reformed, a general negative issue being given on the part of the husband, the wife proved her libel so far as related to the marriage pleaded and propounded in the cause; and the court held that the marriage was proved to have been had as pleaded, and was also proved to be as pleaded, a good and

valid marriage by the laws of Scotland; whereupon he pronounced, decreed and declared the said parties to be lawful husband and wife.

(c) *Anon.* cited 10 East, 267. See 1 Evans's Statutes, 161, n.

(d) 2 Hagg. Cons. R. p. 81.

(e) *Elliot v. Lord Minto*, 6 Madd. 16; *The King of Spain v. Machado*, 4 Russ. 226; *Ex parte Cridland*, 3 Ves. & B. 94; *Anstruther v. Adair*, 2 Mylne & K. 516. See *Snelham v. Bayley*, 5 Ves. 534, a, 2d ed.; 1 Sim. & Stu. 78.

(f) Dick. 588.

(g) S. C. cited 2 Hagg. Cons. R. 86. 98. Reg. Lib. A. 1780, fol. 552.

(h) Lord Mansfield, Cowp. 174.

The rules of English law are matters of evidence in Scotch courts; but the House of Lords, sitting as a court of appeal from the decision of a Scotch court, is equally an English as a Scotch court, and will act on its own knowledge of English law, and not be bound by the report of that law made by English lawyers to the Scotch courts.<sup>(i)</sup> For the same reason that house will act on its own knowledge of Scotch law, \*should any question upon it arise in an [ \*116 ] appeal from an English court.

A verbal declaration of the parties *de presenti* being sufficient to constitute a marriage, it necessarily follows that it may be proved by the verbal testimony of the witnesses who were present when the declaration was made. A marriage celebrated before a minister for which no regular form of words are requisite, may be proved in the same way.<sup>(j)</sup>

A marriage in Scotland may be proved by a witness who was present at the ceremony. The testimony however, of a single witness who could depose of his own knowledge to any fact of marriage between the parties was held insufficient, where the marriage was pleaded to have been had in the presence of divers witnesses, and the deficiency of *primary* evidence was not compensated by any secondary evidence of consummation, cohabitation, mutual acknowledgments, &c.<sup>(k)</sup>

In the case of an irregular marriage, the previous and subsequent conduct of the parties is admissible in evidence upon the question of consent.<sup>(l)</sup>

In supply of proof of a marriage in Scotland, a copy of the register of the Episcopal chapel at Edinburgh had been exhibited; Dr. Lushington said, "I am not aware that such registers are, according to the law of Scotland, documents of an authentic and public nature; nor that a copy of an authentic register is by that law admitted as evidence. But according to the law of this country, as I believe it has been practised in the courts of Westminster Hall, I think I should act more safely by rejecting it. I consider it to be of the highest importance that this court should adhere to the same rules of evidence as prevail elsewhere; indeed I should entertain some doubts whether ecclesiastical sentences could be received in the courts of Westminster Hall as conclusive, if it were known that they were founded on evidence altogether inadmissible by the rules of those tribunals; but however this might be, it is certainly wiser to adhere to the same \*principles wherever practicable. It would therefore [ \*117 ] only be after great consideration and hesitation, or after being bound by an express decision of the superior court, that I could consent to admit such an exhibit; and I reject it the more readily, as the establishment of such a precedent in this case would be perfectly gratuitous, since the marriage is proved by a witness who was present at the ceremony; and since, in point of fact, a Scotch marriage by banns is not more valid than a less formal marriage."<sup>(l)</sup>

(i) *Douglas v. Brown*, 2 Dow & Clark, 397; ante, p. 112.

171. (j) *McAdam v. Walker*, 1 Dow, 185. (l) *Macneill v. Macgregor*, 2 Bligh, N. S.

(j) *McAdam v. Walker*, 1 Dow, 185. 393.

(k) *Nokes v. Milward*, 2 Addams R. 394. (l) *Consey v. Beazely*, 3 Hag. Eccl. R.

A letter granted, on the understanding of both parties, for the purpose, not of constituting a marriage, but of deceiving a third person, is not admissible evidence of a marriage.(m)

A Gretna Green marriage, by English parties, within the territory of Scotland, does not bestow the patrimonial rights of a Scotch marriage along with the *status*; and it was decided, that the surviving wife of such a marriage did not obtain a Scotch terce, but an English dower.(n)

*Matrimonial Causes to be tried before Court of Session.*—Marriage is judicially established by action of declarator in the court of Session, or the question may arise incidentally in the course of another cause. The jurisdiction respecting matrimonial causes subject to revision by the court of Session, and ultimately by the House of Lords, was originally vested in the Commissary court, but it has recently been transferred to another court.(o)

By stat. 11 Geo. 4, and 1 Will. 4, c. 69, s. 33, it is enacted, that all actions of declarator of marriage, and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation *a mensa et thoro*, shall be competent to be brought and insisted on only in the court of Session.

By the 37th section of the same act, in consistorial causes, either the whole cause, or any issue or issues of fact connected with it, may, [ \*118 ] at the discretion of the court, be tried by \*a jury; and the old consistorial oath is changed for the oath usual in other courts of justice in Scotland.

The Commissary court of Scotland was held not competent to a declarator of marriage against a person who had been some time resident there, attending the colleges, not a native of Scotland, nor within it at the time of the citation.(p)

A domicile cannot be created without residence, and in an action for establishing a marriage in Ireland between two natives in that country, the circumstance of the husband leaving a few articles of furniture in Scotland at the date of the citation, without any arrestment of them, was insufficient to establish a jurisdiction.(q)

651. A court of justice cannot delegate its jurisdiction, and ought not to be guided by any foreign opinion upon a question of law; e. g. the admissibility of evidence. *Dunbar v. Harvie*, 2 Bligh, 351.

(m) *Stewart v. Menzies*, 14 Dunlop & Bell, 427.

(n) *Ilderton v. Ilderton*, 2 H. Bl. 145. See Fergusson's Rep. 29.

(o) *Stair's Inst. lib. 3, tit. 3, s. 42; lib. 4, tit. 37, s. 4.*

(p) *Scruton v. Gray*, Mor. p. 4822.

(q) *Forrest v. Funstone*, Mor. 4823.

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## 1. CONCESSION OF ONE FOREIGN STATE TO THE LAWS OF ANOTHER.

It is the natural consequence of the intercourse taking place among civilized nations, that the courts of law of one country are often called upon to enforce rights arising in another, and in doing so, to judge of and give effect to such rights, not according to the laws of their own country, but according to those of the country in which they had their origin, though they can be only bound to do so in so far as is not prejudicial to the legal policy of their own. The laws of one country can have no force, except within the limits and jurisdiction of that country; whatever extra territorial effect they have is not \*derived from any original power to extend them abroad, [ \*119 ] but arises from that respect which, from motives of public policy, other nations are disposed to yield to them, giving them effect with a wise and liberal regard to common convenience and mutual necessities.

*Comitas* is the term used to express the principle upon which courts of independent countries, in deciding questions upon foreign contracts, adopt the rule of the foreign law under which the contract was made. This concession however, is not a duty of obedience, but merely a debt of justice, and is grounded on the prejudice that must arise to important interests of another country from a refusal to observe it.(a)

The true foundation on which the administration of international law must rest, is, that the rules which are to govern, are those which arise from mutual interest and utility; from a sense of the inconveniences which would result from a contrary doctrine; and from a sort of moral necessity to do justice in order that justice may be done to us in return.(b) But the nature and extent and utility of this recognition of foreign laws respecting the state and condition of persons, every nation must judge for itself, and certainly is not bound to recognize them where they would be prejudicial to its own interests. The very terms in which the doctrine is commonly enunciated, carry along with them this necessary qualification and limitation of it. Mutual utility presupposes that the interest of all nations is consulted, and not that of one only. Now this demonstrates that the doctrine

(a) *Ferguson's Rep.* 99. 193. See *Vattel*, p. 62, ss. 14. 16. *v. Russell*, 13 Mass. R. 4; *Rodenburg*, de Stat. Diversit. tit. 1, c. 3, s. 4, p. 8; *Bouhier*

(b) *Livermore*, Dissert. p. 28; *Blanchard* Cout. de Bourg. c. 23, s. 62, 63. p. 457.

tracts to follow the solemnities of the place in which the contract is celebrated, although the solemnities are not observed which are prescribed in the place of the domicile of the parties, or of the situation of the property, in executing the act ;" eo quod sufficit in contrahendo adhiberi solennia loci illius, in quo contractus celebratur, etsi non inveniuntur observata solennia quæ in loco domicilii contrahentium, aut rei sitæ, actui gerendo prescripta sunt.(y) Paul Voet holds the same opinion.(z) Huberis says that a marriage, valid by the law of the place where it is celebrated, is binding every where, under the exception, which he generally applies, that it is not prejudicial to others, or that it is not incestuous.(a) Bouhier adopts the general rule, hesitating as to the nature and extent of the exceptions.(b) [ \*126 ] Hertius lays \*down the following axiom: "If the law prescribes a form for the act, the place of the act, and not the domicile of the parties, or of the situation of the property, is to be considered." Si lex actui formam dat, inspiciendus est locus actûs, non domicilii, non rei sitæ. And he puts the following as an example: "A marriage contracted according to the solemnities of any place, where the married couple are commorant, cannot be rescinded upon the pretext, that in the domicile or country of the husband other solemnities are required." Matrimonium juxta solennitates loci, alicujus, ubi sponsus et sponsa commorabantur, contractum non potest prætextu illo rescindi quod in domicilio aut patriâ mariti aliæ solennitates observentur.(c) He puts exceptions afterwards to this general axiom; one of which is, that a contract between foreigners belonging to the same country is to be governed by the law of their own country, and not by that of the *lex loci contractus*. In this exception he has to encounter many distinguished adversaries.(d) The French jurists seem generally to support the doctrine that marriage is to be held valid or not according to the law of the place of celebration, except in cases positively prohibited by their own law to their own subjects. And Merlin says, that it is a contract so completely of natural and moral law, that when celebrated by savages, in places where there are no established laws, it will be recognised as good in other countries.(e)

#### 4. LIMITATION OF THE RULE FOR THE APPLICATION OF THE LEX LOCI.

Although the *lex loci contractus* is of general obligation from its equity, nevertheless, like every other general rule, it is subject to some limitations. The rule holds only where it does not stand opposed to the religion, morality, or municipal institutions of the country in which it is sought to be applied. If these are in any way

(y) 2 Hagg. Cons. Rep. 415, cites J. Voet, ad Pandectas, lib. 23, tit. 2, s. 4, p. 20.

(z) Voet, De Statut. s. 9, c. 2, n. 9, p. 267.

(a) Si (matrimonium) licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectum que habebit sub eadem exceptione, præjudicium aliis non creandi; cui licet addere, si exempli nimis sit abominandi, ut si incestum jure gentium in secundo

gradu contingeret alicubi esse permittum; quod vix est ut usu venire possit.—Huberus de Conf. Leg. lib. 1, tit. 3, s. 8.

(b) Bouhier, Cout. de Bourg. c. 27, s. 59—66.

(c) Hertii Opera, De Collis. Leg. s. 4, p. 126, s. 10.

(d) Ibid. p. 128, s. 10, Non Valet (6).

(e) Merlin, Répertoire, Mariage, s. 1, p. 343. See also 2 Boullenois, 458; 1 Froland,

threatened or endangered, the rule ceases, and will not be enforced, because it is the first \*law of every state to preserve its religion pure, and its institutions entire. (f) Christianity [ \*127 ] is understood to prohibit polygamy and incest; and therefore no Christian country would recognize polygamy or incestuous marriages. But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of Christendom, are deemed incestuous. It is difficult to ascertain exactly the point at which the law of nature or Christianity ceases to prohibit marriages between kindred; and nations are by no means agreed on this subject. (g) In most of the countries of Europe, in which the canon law has had authority or influence, marriages are prohibited between near relations by blood or marriage; and the canon and the common law seem to have made no distinction on this point between consanguinity or relation by blood, and affinity or relation by marriage, though there certainly is a very material difference in the cases. (h) Marriages between relations by blood, in the lineal ascending or descending line, are universally held by the common, the canon, and the civil law, to be unnatural and unlawful. And a marriage between an uncle and niece by blood has been held in England to be incestuous, upon the ground that it is against the law of God and sound morals; that it would tend to endless confusion, and that the sanctity of private life would be polluted, and the proper freedom of intercourse in families would be destroyed, if such practices were not discountenanced in the strongest manner. (i) This rule has been laid down by one of the North American States: "If a foreign state allows of marriages, incestuous by the laws of nature, as between parent and child, such marriage would not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one state and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state, a marriage between a man and his deceased \*wife's sister is lawful, but it is not [ \*128 ] so in some states; such a marriage celebrated here would be held valid in any other state, and the parties entitled to the benefits of the matrimonial contract." (k)

The *lex loci contractus* will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile. Thus where a second marriage had taken place in Scotland between two persons, one of whom had been previously married, but who had been divorced *a vinculo* of the first marriage by the sentence of the Scotch court; the parties were domiciled in England at the time of the second marriage, as well as of the divorce. The court dis-

*Mem.* p. 177, ch. 1; Pardessus, vol. 5, p. 6, tit. 7, ch. 2, art. 1481 to 1493. Story on Conflict of Laws, 113—115.

(f) See Fergusson's Rep. 90. 314.

(g) Grotius b. 2, c. 5, s. 12, 13, 14. See 1 Brown, Civ. Law, 61—65.

(h) 2 Kent, Comm. p. 81, 82, (2d edit.); 1 Bl. Comm. 434.

(i) *Burgess v. Burgess*, 1 Hagg. Cons. R. 206; *Harrioun v. Burwell*, Vaugh. R. 206;

2 Vent. R. 9; Grotius, b. 2, ch. 5, s. 12, 13, 14; Grotius, b. 2, s. 12, n. 2; 2 Heinecc. Elem. Juris Natur. b. 2, ch. 2, s. 40, by Turnbull. See Story on Conflict of Laws, 104, 105; post, p. 157—160.

(k) *Greenwood v. Curtis*, 6 Mass. R. 378, 379; *Medway v. Needham*, 16 Mass. R. 157, 161; *Wightman v. Wightman*, 4 John. Ch. Rep. 343.

the country, and would enforce the matrimonial duties on all persons within its jurisdiction.(a)

6. MARRIAGE OF ENGLISH PARTIES ABROAD VALID, IF ACCORDING TO LEX LOCI CONTRACTUS.

It is an established principle that every marriage must be tried according to the law of the country in which it took place. This is according to the *jus gentium*, whatever the regulations may be, according to which the marriage has been had; if they are what the canonical law of the foreign country supports, the canonical law of this country must enforce it.(b)

In the great case of *Dalrymple v. Dalrymple*,(c) where the question was as to the validity of a marriage in Scotland, where one of the parties was an English minor, Lord Stowell said, "being entertained in an English court it (the cause) must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England, is, that the validity of the marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." Lord H., an Englishman, was married in Sicily to the Princess of B., not according to the ceremonial rites of the country, but by a priest in a private house, and in the presence of two witnesses, before whom the parties declared themselves husband and wife. On a suit here for restitution of conjugal rights by the wife, it was proved, [ \*132 ] by the depositions of four advocates, that \*according to the decree of the council of Trent, which was the recognized law of Sicily, the marriage, though illicit, was still valid and indissoluble, being an expression of mutual consent to contract matrimony, in the presence of a parish priest and of two witnesses. It also appeared, that by various civil ordinances, and by the pragmatic sanction of the reigning king, Ferdinand, tit. *de Delictis*, parties guilty of such a marriage were, if noble, liable to imprisonment for five years, the husband in a fortress, the wife in a convent; but that this punishment in no way affected the indissolubility of the marriage. Lord H., under this law, had been sent to a fortress, from which he escaped, and the princess to a convent, from which she was released on giving bail to appear at a distant day, which had not yet arrived. In a suit by the wife for restitution of conjugal rights, Lord Stowell held the marriage clearly valid, and refused the prayer of the husband to stay his sentence of cohabitation till the period of separation would expire, when the princess was bound to appear, saying, "that the court could not borrow the criminal law of Sicily, and incorporate it into its own rules."(d)

(a) *Sinclair v. Sinclair*, 1 Hagg. Cons. R. 296.

(b) Per Lord Stowell, *Herbert v. Herbert*, 3 Phill. 63, 64; 2 Hagg. Cons. R. 271.

(c) 2 Hagg. Cons. Rep. 54; Dodeon, 6.

(d) *Herbert v. Herbert*, 2 Hagg. Cons. R. 263; 3 Phill. R. 58.

7. MARRIAGE ABROAD, CONTRARY TO LEX LOCI CONTRACTUS, VOID IN  
ENGLAND.

It is a well-established principle, that a marriage celebrated abroad, and void there, as being contrary to the laws of the country in which it is had, is invalid by the law of this country.(e) This rule, however, is subject to some exceptions, which will be hereafter mentioned.(f) The doctrine was fully recognized in 1752, in the Consistory Court of London, in a case where two British subjects, being minors, and in France, solely for the purposes of education, intermarried in France. The marriage being solemnized in a private house, and by a priest not authorized by the law of France, and without the consent of parents, was declared null by a sentence of the parliament of Paris; and on a suit \*by the lady for restitution of conjugal rights in the Consistory Court here, Sir [ \*133 ] Edward Simpson, in an elaborate judgment, showed that the validity of the marriage must be tried by the law of France, and admitting the French sentence, not as a bar, but as evidence of the law of France, held the marriage void, and dismissed the suit. The court (Sir Edward Simpson) said, "The only question before me is, whether this be a good or bad marriage by the law of England, &c. The question being, in substance, whether by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed; and whether they are not to be construed by that law. If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision. By the general law, all parties contracting gain a forum in the place where the contract is entered into. All our books lay down this for law.(g) There can be no doubt, then, that both the parties in this case obtained a forum by virtue of the contract in France. But entering into the marriage there, they subjected themselves to have the validity of it determined by the laws of that country." And he afterwards proceeded to add, "This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such." (h) And the learned judge proceeded to cite the opinions of civilians to the precise effect; and he afterwards concluded with these remarks:—"So that in cases of this kind, the matter of domicile makes no sort of difference in determining them, because the inconvenience to society and the public in general is the same, whether the parties contracting are domiciled or not. Neither does it make any difference whether the cause be that of contract of marriage; for if both countries do not

(e) *Butler v. Freeman*, 1 Ambl. 303. See *Cona. R.* 407, 408. See *Gaill. lib. 2, obs. 1 Atk. 50.* 123, 36.

(f) *Post*, p. 140.

(h) *Ibid.* p. 512: See *Sanchez, lib. 3,*

(g) *Scrimshire v. Scrimshire*, 2 Hagg. disp. 12, no. 10, 21.



[ \*134 ] observe "the same law, the inconveniences to society must be the same in both cases." (i) It is to be observed, that in this case the residence of the young man had not been of fixed continuance, but was for a few days only, though his mother and family had been resident at Boulogne about two years before the marriage; the young lady had been there only eighteen months, and for the purposes of education.

In *Harford v. Morris*, (k) which was a case of nullity of marriage had abroad, contrary to the *lex loci*, between a guardian and ward of very tender age, under the following circumstances of force or fraud. It appeared that Miss Harford was the illegitimate daughter of Lord Baltimore; that she was extremely young; was born upon the 28th November, 1759, and was placed at a boarding school by Morris, who was one of her testamentary guardians. It was alleged, that he first frequently visited her there, wrote notes to her, and formed a scheme of marriage, carried her to public places in England, and conveyed her at last to France, and from thence to the Austrian Netherlands, thence to Hamburgh, thence to Wandsbeck and Ahrensburgh, in Danish Holstein. The libel set forth two marriages, one on the 21st May, 1772. He went into France the 16th May; they had not been on the continent above five days before they arrived at Ypres, and on the 21st of May, 1772, they were married by a chaplain in the Dutch garrison there, in the presence of two witnesses and of other persons. They did not stay in that place more than one night, but went from thence to Lisle, and from thence to Holland and to Hamburgh and other places; and upon the 3d of January, 1773, a marriage was pleaded to have been had at Ahrensburgh, in virtue of a license from the king of Denmark, granted upon the 5th of December, 1772, that is, a license to dispense with all form, and the marriage was celebrated at a private house, in the presence of four witnesses: one of these marriages was in the English language; one was a public marriage in a church; the other a private marriage by special license in the presence of witnesses. The libel set forth, that they [ \*135 ] were had contrary to the orders of the \*lord chancellor, and without the consent of the parents or guardians, in evasion of the laws of this realm, and contrary to the laws of those countries where they were celebrated; and upon all or some of those accounts it was prayed that the court would pronounce both marriages to be null. The parties in this case had no domicile in the province of Flanders, nor of Holland, nor the United Netherlands; but on the contrary they went as subjects to the crown of Great Britain, and were considered as strangers abroad. The question, therefore, was chiefly whether, according to the laws of England, by which they were regulated, they had done the same, as in Great Britain would be a lawful marriage. Sir George Hay denied the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the court to determine by foreign laws, and said, that the laws of Ypres and Denmark did not reach the case, and that they ought not to be pleaded upon it. The court considered that the residence of the

(i) 2 Hagg. Cons. R. 419. See Lord Cas. 361, 362.

—dowbank's opinion, Fergusson's Rep. (k) 2 Hagg. Cons. R. 423.

parties abroad was merely for the purpose of the marriage, and that they were transient passengers, *voyageurs*, not going into the country with a view of becoming subjects of that country. The learned judge said, "I conceive the law to be clear, that it is not the transient residence, by coming one morning, and going away the next day, which constitutes a residence, to which the *lex loci* can be applied, so as to give a jurisdiction to the law, and cause it to take cognizance of a marriage celebrated there. It is certain that domicile or established residence (that is, such a kind of residence as makes the party subject to the laws of that country) may have that effect; and with respect to persons so domiciled, the laws of the country must be adhered to in contracts made there. This was the case of *Scrimshire*, in which all the proceedings of the Court of France were laid before the court." The learned judge said, that in the case of a man going to Calais, marrying there, and coming away the next day, that he should hold that as much a good marriage, and as agreeable to the law of this country, as a marriage in Scotland. That the laws of France or Denmark had no application to such a case as this, for all foreign laws related to people considered as subjects, and the parties in this [ \*136 ] case \*could not be so considered. The court rejected the libel, but the Court of Delegates decided the marriage to be void, upon the ground of force and custody, without reference to the *lex loci*.<sup>(l)</sup>

The doctrine of the learned judge must, however, be considered as overruled by a subsequent case, in which the circumstance of the parties having been only three days in the country where the marriage was celebrated, was relied on for the purpose of avoiding the application of the *lex loci contractus*. The court, however, decided the marriage to be void, because it was so by the law of the place where celebrated.

In this case an English minor, sent to St. Omer's for education, went to Furnes, in the Austrian Netherlands, and there was married by a priest, in the Dutch language, to a woman of St. Omer's. On proof by practising advocates that the marriage was invalid by the laws of Holland and Flanders, on account of the incompetency of the minister, the minority of the man, and the absence of the banns, the marriage was declared invalid in the Consistory Court.<sup>(m)</sup>

In a recent suit for the restitution of conjugal rights instituted by the husband, it was pleaded that the asserted marriage was void, as not being conformable to the laws of Rome, where it was celebrated. In order to obtain a valid marriage at Rome, it is necessary that there should be a solemn renunciation of the protestant religion, and that both parties should confess themselves to have become Roman Catholics, and that certain other ceremonies should be gone through.

The parties, Miss Kelly, then about nineteen, with her mother, and Mr. Swift and his mother, met at the same hotel in Florence. Mr. Swift paid attentions to Miss Kelly, which were not altogether rejected; he was permitted to apply to the mother, but she refused

(l) 2 Hagg. Cons. R. 436, n. Mr. Baron Eyre is stated to have had great difficulty on the point of *lex loci*. (m) *Middleton v. Janverin*, 2 Hagg. Cons. R. 437.

her consent. The two families removed to Rome: and it was alleged by Swift, that a secret marriage then took place; and the validity of this asserted marriage at Rome was the question at issue. The wife [ \*137 ] denied her consent to any fact of marriage; but an attachment, a willingness on her part to be united to Swift, could not be denied, because she was ready to sign a promise to marry him on her coming of age. Consummation was strongly alleged in the libel, but it was also strongly denied by the other party. The sentence of the court was, that the pretended marriage, if in fact any such was had between the parties, was void, and that Miss Kelly was at full liberty to contract and solemnize legal marriage with any other person, and Mr. Swift was condemned in the costs of the suit. (n)

(n) *Swift v. Kelly*, Arches' Court, 9th of July, 1833. An appeal against the decision in this case is pending before the judicial committee of the Privy Council. It seems that the marriage in this case was held valid by the Privy Council, on the ground that there had been a sufficient conformity to the *lex loci*. See 5 Jurist, 168.

The following is a short statement of the facts:—

Miss Elizabeth Catherine Kelly, when nineteen years of age, became first acquainted with Mr. William Richard Swift, in the month of February, 1829, in Florence, where the said Mr. Swift then resided with his mother. The said Mr. Swift made to Miss Kelly the proposition of a secret marriage together; the young lady rejected the proposal, and declared that she would never consent to any marriage without the consent of her own mother, Mrs. Mary Anne Kelly.

In the month of February, 1830, Miss Kelly continued her travel, and proceeded to Rome with her said mother. Shortly after, Mr. William Richard Swift and his mother the Countess Mulandi, arrived at Rome, and took an apartment at the Hotel della Gran Bretagna, where, a short time before, the two ladies, Mrs. Kelly and Miss Kelly, had also arrived. The inmates, although living in separate apartments, nevertheless continued seeing each other as they had done before when at Florence. Mr. Swift availed himself of this opportunity for again urging the said Miss Kelly to comply with the proposal which he had before made to her, of being married together. Miss Kelly did not then give the same refusal as before, but gave her consent to a marriage to be contracted at a future time, and when she would be of age, and declared that she was willing to sign her consent to that in an instrument which would be prepared for it by Mr. Swift himself. In the meantime Mr. Swift actually made abjuration of the protestant religion, and embraced the Roman Catholic. Miss Kelly is represented as quite ignorant of all the said Mr. Swift had been doing, both with regard to his said abjuration, as well as the use which he says he had procured from

his Eminence, the Cardinal Vicar of Rome, for the celebration of his marriage with Miss Kelly.

Late in the evening of 25th of March, 1830, the young lady having proceeded to the apartments of the Countess Mulandi, at the desire of Mr. Swift, found there with the latter three persons entirely unknown to her. When there, Miss Kelly had two paper writings presented to her for her to sign them; the young lady, without examining the papers, signed them, under an idea that they contained the promise in question of a marriage at a future time; and she immediately went away back to the apartments of her mother, Mrs. Kelly. Of what might follow at the apartments of the countess, after Miss Kelly had signed the two papers, she had not any knowledge whatever.

These things being done, Mr. Swift afterwards said to Miss Kelly that he considered her as his lawful wife after the celebration of the wedding on the evening of the said 25th of March. Surprised and angry, Miss Kelly declared that the pretended marriage could not be valid, by it being done without her knowledge, and that she would never more have any thing to do with him.

On the 13th of April, in the apartments of the said countess, Miss Kelly, in the course of conversation, had some discourse with Mr. Swift, from whom she then for the first time heard that of the two paper writings which she had signed in the evening of the 25th of March, one contained her abjuration of the protestant religion, and the other her consent to a marriage with Mr. Swift. A private conference was appointed to take place between Miss Kelly and Mr. Swift. In this conference, Miss Kelly again vowed that she was determined never more to have any thing to say to him, the said Richard Swift, and resolved to take proceedings for having the marriage of the 25th of March declared null and void, by reason of its having been fraudulently extorted. To this Mr. Swift made opposition. Since that conference nothing more seems to have passed between the two parties.

In the meantime Mr. Swift pretends that

The author \*has not the means of stating the grounds [ \*138 ] upon which the decision turned, the case not being yet reported, except so far as relates to the objections taken to the answers of Mr. Swift.(o)

In an action of assumpsit, in which the marriage of the parties was in dispute, it appeared that, about five years before, the defendant, then being the widow of one Isaacs, met with Mr. Higgins at Paris, and that, after being for some time acquainted, they went to Versailles for the purpose of being married. A witness was called, who stated that he was present at Versailles when the marriage between the parties was celebrated by a protestant priest, or generally reported to be a priest, and wore the habit of one at the time of the marriage. No other witness was present except a *femme de chambre* in the service of the defendant. Some written document was then made relating to the marriage, and signed by the parties, and this was delivered to this witness, who afterwards married, and whose subsequent residence could not be ascertained. The parties had cohabited as husband and wife, at Paris, for about a year after the marriage, and afterwards in Ireland, the husband being an attorney there, and had been visited as such by persons of both sexes, and of great respectability.

The prescriptions with respect to marriage in the [ \*139 ] French \*code had not been complied with, and the French vice-consul, who was examined, stated that it contains no clause nullifying a marriage on account of such non-compliance. Evidence was given that a marriage in France, celebrated in fact without observing the previous forms prescribed by the code, would be considered by the French courts to be a mere nullity. Lord Tenterden, C. J., was of opinion, that the marriage was illegal in conformity with the decision of Lord Stowell,(p) that a foreign marriage was valid or invalid in this country according as it was valid or invalid by the law of the country in which it was celebrated. In that case the question was, whether the marriage was valid according to the law of Scotland where it was contracted. Here, the question is, whether the marriage was valid according to the law of France; and it appears from the evidence, and upon reference to the French code, that the marriage has not been contracted according to the legal ceremonies which were essential to a valid marriage in France. The French code contains no express declaration that a marriage otherwise celebrated shall be deemed to be void, but merely directs that the marriage shall be celebrated in a particular manner; but it is proved by the witness, that marriages otherwise celebrated are void.(q)

he is the lawful husband of Miss Kelly; the latter denies her ever having changed her native religion, and insists that the pretended marriage is of no validity.

(o) *Swift v. Swift*, otherwise *Kelly*, 4 Hagg. Eccl. R. 139.

(p) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 54; Dodson, ante, p. 131.

(q) *Lacon v. Higgins*, 3 Stark. N. P. C. 178.

It may be doubted whether this marriage was void by the French law. The Vice-

Consul's statement is certainly incorrect, that all marriages contrary to articles 63, 64, and 74 of the civil code are void. The breach of article 63 (which requires two publications of the parties' names, &c. at eight days' interval, before the door of the town-hall) is punishable by fine on the civil officers and parties, by article 192; and article 193, in imposing a similar fine for a breach of the much more essential condition of article 165, which makes it essential that the marriage shall be celebrated publicly, and

[ \*140 ] \*English subjects, after a residence in France of six months, may be married according to the law of France, in the same manner as French subjects: and such residents may, without six months' residence, be married at the English ambassador's by his chaplain, and such marriages are common and perfectly legal.(r)

8. WHEN MARRIAGES ARE VALID, THOUGH NOT CELEBRATED ACCORDING TO THE LAW OF THE PLACE.

Although English decisions have adopted the rule, that a foreign marriage, valid according to the law of the place where celebrated, is good every where else, yet they have not, on the other hand, established that marriages of British subjects not good according to the law of the place where celebrated, are universally, and under all possible circumstances to be regarded as invalid in England. "It is, therefore (observed Lord Stowell)(s) certainly to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done, on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet if a contrary practice has been sanctioned by long acquiescence [ \*141 ] and acceptance of the one country, that has silently permitted \*such marriages, and of the other which has silently accepted them, the courts of this country, I presume, would not incline to shake their validity upon these large and general theories, encountered as they are, by numerous exceptions in the practice of nations." And accordingly Lord Stowell decided, that a marriage had under peculiar circumstances at the Cape of Good Hope, during

that the celebration shall be before the civil officer of the domicile of one of the parties, expressly says, the penalty shall be enforced, "though the contraventions should not be judged sufficient to pronounce the nullity of the marriage," thereby implying that some contraventions, even of article 165, would not produce nullity. And it has been decided (Cour de Cass. Juin, 1803,) that non compliance with article 74, by residing six months in the place of marriage, does not render the marriage void. But the marriage in the text, being not celebrated by the civil officer nor publicly, nor in the domicile of either of the parties (contrary to articles 74 and 165,) would rather seem to be void. By article 191, "Every marriage which has not been contracted publicly, and has not been celebrated before the competent public civil officer may be attacked by the parties themselves, by the fathers and mothers and ancestors, and by all those having a vested and actual interest in it, and also by the public authorities;" and though cohabitation followed in this case, it would seem that it would not even fall within the restriction of

article 196, which provides, "that when there is an actual marriage, and the act of celebration before the civil officer is produced, the parties themselves cannot demand the nullity of the act," for in this case there was no celebration before the civil officer. However, French lawyers differ as to the question. The late M. Portalis (*Exposé des Motifs*, p. 255,) says, "The most grave of all nullities is that which arises from the marriage not being celebrated publicly, and in the presence of the competent civil officer. There is no marriage but only illicit commerce between parties who do not form their engagement in the presence of the competent civil officer; 1 Toullier, 534, n. (2). M. de Maleville, on the other hand says, that the nullity resulting from the contravention of art. 165, is not radical, but depends on circumstances which the wisdom of the judges only can appreciate. *Ib.* 534. See *Bac. Abr. Marriage*, (D) n. (b).

(r) *Lacon v. Higgins*, 3 Stark. R. 183. See ante, pp. 73—76.

(s) 2 Hagg. Cons. R. 390, 391.

British occupation, was valid, though not in conformity with the Dutch law. In that case the husband (an Englishman) was a person entitled by the laws of his own country to marry without the consent of parents or guardians, being of the age of twenty-one; but by the Dutch law he could not marry without such consent until thirty years of age. The lady (an Englishwoman) was under the age of nineteen, her father was dead, her mother had married a second husband, and she had no guardian. The time of the marriage, which took place shortly after the compelled surrender, was considered material. The case, therefore, had no resemblance to the case of Ireland, the Isle of Man, the plantations, or even Minorca, where recognized civilized governments are established, and a permanent system introduced, of which all must be supposed to be cognizant. The Cape was conquered, but not ceded; and it remained for a treaty of peace to decide to whom it was to belong. The ancient civil sovereignty was suspended, and no other fully established in its place. The character of the individuals was likewise considered material: the husband not having gone there as a volunteer or settler, but as a military servant of the British government. The court also rested the validity of the marriage on the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on the insuperable difficulties of obtaining any marriage conformable to the Dutch law—on the countenance given by British authority and ministrations to that transaction, and upon the whole country being under British dominion. Upon that occasion Lord Stowell said, "Suppose the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood, at forty, it might surely be a question in an English court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be \*invalidated in England upon that account; or in other words, whether a protection intended [ \*142 ] for the rights of Dutch parents, given to them by the Dutch law, should operate to the annulling a marriage of British subjects, upon the ground of protecting rights, which do not belong, in any such extent, to parents living in England, and of which the law of England could take no notice, but for the severe purpose of this disqualification. The Dutch jurists (as represented in this libel) would have no doubt whatever, that this law would clearly govern a British court. But a British court might think that a question not unworthy of further consideration, before it adopted such a rule for the subjects of this country."

In deciding for Great Britain upon the marriages of British subjects, they (the Dutch jurists) are certainly the best and only authority upon the question, whether the marriage be conformable to the general law of Holland: and they can decide that question definitively for themselves, and for other countries. But questions of a wider extent may lie beyond this: whether the marriage be not good in England although not conformable to the general Dutch law; and whether there are not principles leading to such a conclusion? Of this question and of those principles they are not the authorized judges; for this question and those principles belong either to the law of England, of which they are not the authorized expositors at all, or to the jus

*gentium*, upon which the courts of this country may be supposed as competent as themselves; and certainly, in the cases of British subjects, much more appropriate judges."<sup>(t)</sup>

In a suit for nullity of marriage instituted on the part of the wife, with reference to the circumstance of the marriage, as celebrated in France, by the chaplain of the British forces under the Duke of Wellington, and not in conformity to the law of France, on the ground that the marriage was void, because not celebrated according to the *lex loci*; Lord Stowell doubted, as the husband was an officer of the army of occupation, marrying an English lady, whether the law of France would apply to him, on the ground that at that time and under such circumstances the parties were not French subjects, under [ \*143 ] the dominion of the French law. Without, \*however, giving any decided opinion, the court admitted the libel, in order to enable the party to bring the cause to a regular decision; but it does not appear that any further proceedings took place.<sup>(u)</sup>

In the discussion of a divorce bill in the House of Lords, Lord Eldon intimated a doubt respecting the validity of a marriage which was celebrated at Rome by a *protestant* clergyman, both parties being protestants; and said, that where persons were married abroad, it was necessary to show that they were married according to the *lex loci*, or that they could not *avail* themselves of the *lex loci*, or that there was no *lex loci*. Some days after a Roman Catholic clergyman was produced at the bar of the House, who swore that at Rome two protestants could not be married according to the *lex loci*; because no Catholic clergyman could celebrate marriage between two protestants. The marriage was held to be good.<sup>(x)</sup>

In a suit for a divorce by reason of cruelty, it appeared that the parties were married at Rome in 1821. On the question as to the admissibility of the libel, which merely pleaded that the marriage was a good and valid marriage, Dr. Lushington said that he was not aware of any instance in which a marriage celebrated abroad, in the dominions of a foreign prince, had been ever pleaded to be a good and valid marriage, unless alleged that it was according to the *lex loci*, or had been solemnized in the house of the British ambassador or minister of some sort. Here was a marriage solemnized at Rome by an English priest between English protestants; but how that could be a good and valid marriage by the *lex loci* he was yet to learn. It was exceedingly inconvenient to admit the libel before he knew the grounds on which the validity of the marriage was to be supported. The libel was generally admissible: but he must refer it back for reformation on some points, and especially as to the marriage, for the case should not go to proof whilst any difficulty remained on that point.<sup>(y)</sup>

[ \*144 ] \*Whilst the British army was at St. Domingo, two persons belonging to that army went to a chapel in the town of Cape St. Nicola Mole, in order to be married; and there

(t) *Reading v. Smith*, 2 Hagg. Cons. R. Dignities, 276, s. 85, 2d ed. n. 389, 390.

(u) *Burn v. Farrar*, 2 Hagg. Cons. R. 369, cited in *Reading v. Smith*, ib. 387, 388.

(x) *Case of Lord Cloncurry*, Cruise on

(y) *Lockwood v. Lockwood*, Cons. Court, 1st June, 1838; Monthly Law Magazine, vol. 3, p. 273.

a service was read in the French language by a person who dressed like a priest, and interpreted into the English language by a person who officiated as clerk. The pauper did not understand the French language, but by the interpreter she understood it was the marriage service of the established church of England, read in French. She did not know that the person officiating was a priest. She received a certificate of marriage, which she lost. There was no chaplain with the British forces at that time in St. Domingo. No evidence was given of the laws or usage of the island respecting the marriage ritual there. She and the man lived together as man and wife till his death, and she was removed to his settlement. The sessions were of opinion that this order was bad and quashed it. On the case coming before the court of King's Bench, Lord Ellenborough, C. J., said, "First, considering it as a marriage celebrated in a place where the law of England prevailed—for I may suppose in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them—then, was it a good marriage before the marriage act? Certainly, before that act a contract of marriage *per verba de presenti* would have bound the parties. This was such a marriage, and performed by one who publicly assumed the office of a priest, and appeared habited as such; of what persuasion does not appear: but even if it were performed by a Roman Catholic priest, the case would be the same; for such a person would be recognized by our church as a priest capable of officiating as such, upon his mere renunciation of the errors of the church of Rome. But *Rex v. Fielding*,<sup>(z)</sup> shows that a marriage by a Roman Catholic priest (before the marriage act) was effectual for that purpose, which was considered as a contract *per verba de presenti*. In this case the ceremony was performed in a public chapel, instead of in \*private lodgings as in *Fielding's case*. Considering therefore the case to be that [ \*145 ] the king's forces carried with them the law of England to St. Domingo, by which they and other subjects who accompanied them (in the absence of proof that any other law was in force there) may be considered as continuing to be governed, this would be a good marriage by that law. But supposing this law of England not to have been carried to St. Domingo, by the king's forces, nor obligatory upon them in this particular, let us consider whether the facts stated would not be evidence of a good marriage according to the law of that country, whatever it might be. And indeed after the ceremony of marriage, as it was understood and intended by the parties at the time to be performed openly in a chapel, by a person appearing there as a priest, authorized to perform the ceremony of marriage, and this followed by a cohabitation between the parties for 11 years afterwards, every presumption is to be raised in favour of its validity. I should have considered myself as safe in resting my opinion in favour of this marriage upon the law of England, independent of the provisions of the marriage act. But without the aid of that, I think every presumption must be made in favour of its validity, according to the

(z) See ante, p. 32.



law of the country where it was so celebrated, having been performed there in a proper place, and by a person officiating as one competent to perform that function." The other judges agreed, and the order of sessions was quashed.(a)

#### 9.—MARRIAGES OF ENGLISH SUBJECTS IN THE FACTORIES ABROAD.

The marriages of British subjects at the factories are regulated by the law of the original country to which they belong, which is another exception in favour of marriages not celebrated according to the laws of the place. The validity of such a marriage does not appear to have been the subject of an express decision, but is fully recognized by the opinion of learned judges and some acts of the legislature.

Sir George Hay,(b) after observing that every domicile did not [ \*146 ] give a jurisdiction to a foreign country, so that the \*laws of that country are necessarily to obtain and attach upon a marriage solemnized there, said, "for what would become of our factories abroad, in Leghorn or elsewhere, where the marriage is only by the law of England, and might be void by the law of that country; nothing will be admitted in this court to affect such marriages so celebrated, even where the parties are domiciled; but where the parties are not domiciled, and only going, I will not say to evade the laws of this country, as that is an improper expression; but to celebrate a marriage there, by the laws of this country, it shall not be affected by the marriage act, from which persons are expressly exempted that are beyond the sea.(c) Can such a marriage then be called in question in this court? I cannot say *that*, any more than I can say a Scotch marriage shall be called in question, to affect the rights of so many people married under the notion of the marriage act not reaching them, where they mutually contracted themselves."

Lord Stowell inquired "What is the law of marriages in all foreign establishments, settled in countries professing a religion essentially different—in the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in the factories in the East, Smyrna, Aleppo, and others? in all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration,) marriages are regulated by the law of the original country, to which they are still considered to belong. An Englishman resident at St. Petersburg does not look to the ritual of the Greek church, but to the rubric of the church of England, when he contracts a marriage with an English woman. Nobody can suppose that, whilst the Mogul empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage, in the extensive dominion of Turkey, is left to depend, I presume, upon their own canons, without any reference to the Mahometan ceremonies. There is a *jus gentium* upon

(a) *Rez v. Bampton*, 10 East, 262.

(c) See 26 Geo. 2, c. 33, s. 31; 4 Geo. 4,

(b) *Harford v. Morris*, 2 Hagg. Con. R. c. 76, s. 33; 6 & 7 Wm. 4, c. 85, s. 45.

this matter, a comity which treats with tenderness, or at least with toleration, the opinions and usages \*of a distinct people in [ \*147 ] this transaction of marriage. It may be difficult to say, *a priori*, how far the general law should circumscribe its own authority in this matter, but practice has established the principle in several instances; and where the practice is admitted it is entitled to acceptance and respect.(d)

*Marriages solemnized at St. Petersburg since the Abolition of the British Factory there declared valid.*—The stat. 4 Geo. 4, c. 67, after reciting that the British factory at St. Petersburg was by the manifesto of the Emperor of Russia declared to be abolished from and after the 20th of June, 1807, and that divers marriages of subjects of this realm resident at St. Petersburg had, since the said 20th of June, 1807, been solemnized there by the chaplain of the Russia Company in the chapel of the said company, and in private houses, before witnesses, according to the religious ceremonies of the church of England; and that it was expedient to declare the validity of such marriages, in order that no doubts or inquietude might hereafter arise thereupon: "That all marriages (both or one of the parties thereto being subjects or a subject of this realm) that have, since the said 20th day of June, 1807, been solemnized, or that shall hereafter be solemnized at St. Petersburg by the chaplain to the said Russia Company, or by a minister of the church of England officiating instead of such chaplain, in the chapel of the said Russia Company, or in any other place before witnesses, shall be as good and valid in law, and so deemed in the united kingdom of Great Britain and Ireland, and in the dominions thereunto belonging, as if the same had been solemnized before the abolition of the said factory."

*Marriages solemnized at Hamburg since the abolition of the British Factory there, declared valid.*—The statute 3 & 4 Will. 4, c. 45, after reciting that the British factory at Hamburg was dissolved, and the privileges thereof abolished, in the year 1808; and that divers marriages of subjects of this realm resident in Hamburg have, since the abolition of the said factory and privileges, been solemnized there by the chaplain appointed by the lord bishop of London, or some minister of the church of England officiating instead of such chaplain, in the British Episcopal chapel, and in private houses in \*that [ \*148 ] city, before witnesses, according to the rites of the church of England; and that it is expedient that no doubts should hereafter arise as to the validity of such marriages, declared and enacted, "That all marriages of parties subjects, or parties one of them being a subject of this realm, which have been solemnized at Hamburg since the abolition of the British factory there, by the chaplain appointed by the lord bishop of London, or by any ministers of the church of England officiating instead of such chaplain in the Episcopal chapel of the said city, or in any other place, before witnesses, according to the rites of the church of England, shall be good and valid in law to all intents and purposes as if the same had been solemnized in the British Factory at Hamburg before the abolition thereof."(e)

(d) 3 Hagg. Cons. R. 385, 386.  
JULY, 1841.—M

(e) See ante, p. 76.

## 10. EVIDENCE OF FOREIGN MARRIAGE LAW.

The existence of a foreign law is a fact to be proved by appropriate evidence, for our laws cannot take notice of foreign laws without such proof.<sup>(f)</sup> If the validity of a marriage is to be tried by the laws of other countries, such laws must be laid before the court and proved in the best manner possible; not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates laying the ordinances of those countries before the court.<sup>(g)</sup>

The usual mode of proving the foreign law is by the examination and judgments of the professors of such law producing such law, and showing that it is the existing law according to their opinions.<sup>(h)</sup>

The evidence of eight gentlemen practising as lawyers, who stated their opinions of the law, was admitted under particular circumstances, without any other authentic exemplification of the laws and ordinances of the countries in question.

These witnesses with reference to the circumstances pleaded in the libel, concluded "that by the laws of the united provinces of the Low Countries, and the ordinances of the states of Holland in 1580, and [ \*149 ] 1656, there was no doubt but that \*the marriage in question was null and void on three grounds; first, on account of the incompetency of the minister who celebrated the same; secondly, on account of the minority of one of the parties; and thirdly, from the want of publication of banns."

In answer to the objection, that evidence of opinion that such is the law, is not that evidence of the law which the court ought to require, but that it ought to have had an authentic exemplification of the laws and ordinances of those countries, the court said, the particular parts of the laws which are referred to by the advocates are copied into their opinions; therefore I think there is every authentication and every ground the court can have to believe that such ordinances and such laws, as they mention, were actually by proper authority published, and were, at the time in question, valid and in force. To be sure, the best evidence would be a sentence of a court of judicature of those countries. In the case of *Scrimshire v. Scrimshire* that was obtained; but in this case that would be impossible.<sup>(i)</sup>

A sentence of the parliament of Paris declaring a marriage between English parties in France void, was admitted as evidence of the law of France upon that subject.<sup>(k)</sup>

In a suit of divorce brought by the wife against her husband by reason of cruelty and adultery, the husband alleged in bar that such suit could not be entertained, because the marriage had been celebrated at Paris, and had been since dissolved by a sentence of the court at Brussels, on proceedings instituted by him for nullity and divorce, by reason of the adultery of the wife. It appeared that there had been another marriage between the parties in England, and that

(f) *Freemoult v. Dedire*, 1 P. Wms. 431; 271; 3 Phill. R. 64.

Vin. Abr. Foreign (C:) *Feaubert v. Turst*,  
Proc. Ch. 217.

(i) *Middleton v. Janverin*, 2 Hagg. p. 442.

(g) *Harford v. Morris*, 2 Hagg. Cons. R. 430.

(k) *Scrimshire v. Scrimshire*, 2 Hagg. Cons. R. 396, 411.

(4) *Herbert v. Herbert*, 2 Hagg. Cons. R.

the sentence abroad was of nullity only, without reference to adultery. In this case Lord Stowell said "Something has been said on the doctrine of law regarding the respect due to foreign judgments; and undoubtedly a sentence of separation in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is \*said, that a sentence of nullity of marriage is necessarily and universally [ \*150 ] binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels on a marriage in France, would have the same authority, much less on a marriage celebrated here in England. Had there been a sentence against the wife for adultery in Brabant, it might have prevented her from proceeding with any effect against her husband here; but no such sentence any where appears." The result was, that the sentence was held not to bar the wife from proceeding in this country.(l)

A defendant offered to prove that King, being a Jew, and his former wife a Jewess, were divorced at Leghorn according to the rites and customs of the Jews there, and that after such divorce it was competent to either party to marry again. To prove this, an instrument whereby they were divorced from each other, under the seal of the synagogue there, was produced. But Lord Kenyon held this no evidence, for before he could take notice of any proceeding in a foreign court, he must know the law of the country, which was matter of evidence and should be proved by witnesses. But the Jewess herself was permitted to give parol evidence of her own divorce in a foreign country, according to the custom of the Jews there.(m)

\*Foreign laws, if in writing, must be proved by a copy [ \*151 ] properly authenticated.(n)

It is stated to have been held by Lord Kenyon, and confirmed in the King's Bench, that the unwritten law of a foreign country can only be proved by documents properly authenticated.(o)

(l) *Sinclair v. Sinclair*, 1 Hagg. Cons. R. 297. The sentence of a foreign court having jurisdiction, seems to be conclusive on the persons within it. *Barrow v. Jemineau*, Sel. Cas. Ch. 69. See 3 Mod. 194; Bull. N. P. 245; 1 Roll. Abr. 530. B.; *Cottingham's case*, 2 Swanst. 326 n.

(m) *Genet v. Lady Lanesborough*, 1 Peake's Cas. 25, 3d edit.

(n) *Clegg v. Levy*, 3 Camp. 30; *Miller v. Heintzick*, 4 Camp. 155; 30 How. St. Tr. 91; 1 Camp. 63.

(o) *Boehlinck v. Schneider*, 1 Esp. 58; 3 East, 380. In this case evidence was admitted of one of the documentary navigation laws of Russia, and also of a documentary opinion of the judges of the Custom House court of St. Petersburg, on the effect and operation of that law, signed by the presiding judges of that court; but on a special case reserved for the opinion of the Court of King's Bench upon the admissibility of the latter document, no opinion was given.

But in *Millar v. Heinrick*,<sup>(p)</sup> Gibbs, C. J., said, foreign laws not written are to be proved by the parol examination of witnesses of competent skill.<sup>(q)</sup>

Upon a question with respect to a colony, whether the law of the mother country is the law of the colony, the statement of text writers may be admitted. In *General Picton's case*,<sup>(r)</sup> where such a question was suggested as likely to occur, Lord Ellenborough said, "The text-writers furnish us with their statement of the law; and that would certainly be good evidence, upon the same principle which renders histories admissible. There is a case," continued Lord Ellenborough, "in which the history of the Turkish empire by Cantenier, was received by the House of Lords, and received after some discussion; I shall therefore receive any book that purports to be a history of the common law of Spain."

In order to establish the law of France in relation to marriages, a witness was called, who was the French vice-consul here, who produced a book, which he said contained the French code of laws upon which he acted at his office. He stated that there was in Paris an office for the printing of the laws in France, called the royal printing office, where the laws were printed by the authority of the French government. The book itself, which not only contained a body of French laws, but also a commentary upon them, for the use [ \*152 ] of students, by M. Sirey, purported to have been printed at that office, and to contain a copy of the constitutional charter of France. The witness also stated, that this book would have been acted upon in any of the French courts. On the part of the defendant it was insisted, that this evidence was insufficient to warrant the reading of the French ordinances, in relation to marriage, from that book. It was very possible that the book might be receivable in the courts of France as evidence of the known law there, in the same manner as printed copies of the statutes are used in the courts in this country; but this would not make them admissible evidence elsewhere; as the code of French laws was a written code, a copy of that code examined with the original ought to be proved.

On the other hand it was insisted, that the book produced, coupled with the parol testimony of the witness, was sufficient. Lord Tenterden, C. J., at first doubted whether it was not necessary to prove the written law of France, by means of an examined copy of the original charter; but, upon the authority of *Picton's case*, said he would admit the book as evidence.<sup>(s)</sup> It seems that the evidence was received in this case by consent; it can scarcely therefore be considered as a decision, that foreign law can be proved by an unprofessional person.

Where the opinions of foreign advocates upon the French law differed, but each of them founded their opinion upon the French code, the court thought itself at liberty to refer to the text of that code in order to form their own judgment.<sup>(t)</sup>

In a court of equity an affidavit will be received for verifying

<sup>(p)</sup> 4 Camp. 155.

<sup>(q)</sup> See *Buchanan v. Rucker*, 1 Camp. 63.

<sup>(r)</sup> *Alex v. Picton*, 30 Howell's St. Tr. 92.

<sup>(s)</sup> *Lacon v. Higgins*, 3 Stark. N. P. C. 178; see *ante*, p. 151.

<sup>(t)</sup> *Trimby v. Vignier*, 4 Moore & S. 704; 1 Bing. N. R. 151.

foreign law, but it must be by a professional person who has practised in the foreign court, and be positive as to the law, and not confined to mere hearsay or belief.(u)

The courts of England will not adopt a rule of evidence from foreign courts: thus a judgment of the supreme court of Jamaica was held not to be proved by a copy signed by the clerk of that court, though it was proved that such copies \*were received as [ \*153 ] evidence in Jamaica;(x) but if there be no seal of the court or island, an examined copy must be obtained, or proof of the judge's signature upon the judgment.(y)

The fact of a foreign marriage may be established by the sentence of a foreign court having competent jurisdiction, in a suit instituted there; and this generally speaking, is conclusive by the law of nations; for otherwise the rights of mankind would be very precarious and uncertain.(z)

Willes, C. B., could not agree with the resolution in *Alsop v. Bowtroll*,(a) that a certificate under the seal of the minister at Utrecht, and of the said town, of the marriage of two persons there, and that they cohabited together as man and wife, was a sufficient proof. The certificate of the minister of the fact of the marriage at a place where there was no bishop might perhaps be equal to the bishop's certificate here, which is in some cases conclusive evidence of a marriage. But he was clearly of opinion that the certificate of their cohabiting together ought not to have been admitted.(b)

A copy of a register of baptism or marriage in the island of Guernsey is not evidence here: for although credit is given by courts of justice to such registers in this country as being made under the ecclesiastical jurisdiction, yet the same credit is not given to the registers of any other place in the absence of proof that they are made under proper authority.(c)

So an examined copy of the register of the marriage in the Swedish ambassador's chapel at Paris is not receivable in evidence.(d)

In *Bruce v. Burke*,(e) the article in a libel as to the law of marriage in Ireland, was proved by two barristers who had practised at the Irish bar.

(u) *Hill v. Rearden*, Jac. R. 89, 90. As to proving a marriage abroad in Chancery, see 1 Smith's Ch. Pr. 527.

(x) *Appleton v. Lord Braybrooke*, 6 Maule & S. 34; Ball. N. P. 229. See *Brown v. Thornton*, 6 Ad. & Ell. 185; *Adamthwaite v. Synges*, 1 Camp. 183. See Phillips on Evid. 623, 634, 8th ed.

(y) *Aloes v. Bunbury*, 4 Camp. 28.

(z) Per Lord Hardwicke, *Rosch v. Gar-*

*ven*, 1 Ves. sen. 159.

(a) Cro. Jac. 541.

(b) *Omichund v. Barker*, Willes, 549.

(c) *Huet v. Le Mesurier*, 1 Cox, 275. See ante, p. 59.

(d) *Leader v. Barry*, 1 Esp. 353.

(e) 2 Addams R. 473. As to proving Jewish matrimonial law, see ante p. 67; and as to Scotch marriages, ante 112.

## [ \*154 ]

## CHAPTER III.

## OF THE IMPEDIMENTS TO MARRIAGE.

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## SECT. 1. OF CONSANGUINITY AND AFFINITY.

*Canonical and Civil Disabilities.*—The impediments to marriage are of two kinds, canonical and civil. The one is called an *impedimentum impeditivum*, an impediment which throws an obstruction in the way of the celebration of marriage; and the other an *impedimentum dirimens*, an impediment which affects the validity of the marriage notwithstanding it has been actually celebrated. The canonical disabilities are consanguinity, affinity, and certain corporal infirmities which incapacitate the party for the performance of conjugal duties; to which may be added, though of rare occurrence, force and error.

Civil disabilities are a prior marriage, want of age, idiotcy, lunacy, or mental incapacity, and the violation of certain provisions contained in statutes relating to marriage.

The canonical disabilities only make the marriages voidable, and not ipso facto void, until sentence of nullity be obtained; and such marriages are esteemed valid for all civil purposes, unless sentence of nullity is actually declared during the lifetime of the parties.(a) Civil disabilities make the contract void *ab initio*, because the parties are incapable of contracting; and if persons subject to the latter disabilities come together, it is a meretricious and not a matrimonial union.(b)

[ \*155 ] Within this class must now be included the marriages\*of persons within the prohibited degrees of consanguinity and affinity which took place after the 31st August, 1835.(c)

Consanguinity is relationship by blood, and is either lineal, as between father and daughter, grandson and grandmother, or collateral, as between brother and sister, uncle and niece.

Affinity arises in consequence of marriage, for husband and wife being accounted one person, the blood relations of each of the married couple are related to the other by affinity.(d)

*New Statute as to Marriages within the prohibited Degrees.*—By

(a) See post, as to void and voidable marriages.

(b) 2 Phill. R. 19.

(c) 5 & 6 Will. 4, c. 54.

(d) Incestus nuptias contrahunt proprios cognati et affines. Cognati sunt, qui a communi stipite descendunt sive ex justis nuptiis ea cognatio sit, sive ex illegitimo coitu sive ex contubernio servili. Affinitus est necessitudo inter conjugem unum et alterius familiam. Cognatio ex gradibus et lineis indicatur. Gradus est distantia cognatorum,

linea est series personarum a communi stipite descendunt easque vel recta quæ genitores et genitos; vel obliqua, quæ a latere junctos complectitur. Heineccius, Elem. Jur. Nat. lib. 1, tit. 10, de Nuptiis, ss. 152, 153. Affinitatis nulli sunt gradus quia nullas generationes; tamen recepta regula; quoto gradu mihi aliquis cognatus est, eodem gradu ejusdem conjux mihi affinitate junctæ censetur. Heineccius, Elem. Jur. Nat. lib. 1, tit. de Nuptiis, s. 156. Ut vir et uxor unam et eandem inter se carnem habere existi-

the law, as altered by the recent statute,(e) all marriages before the 31st August, 1835, between persons within the prohibited degrees of consanguinity, are voidable during the lives of both parties. But marriages before that time, within the prohibited degrees of *affinity*, cannot be annulled unless a suit was then pending. And all marriages celebrated after 31st August, 1835, between persons within the prohibited degrees of consanguinity and affinity, are made absolutely void.

The statute 5 & 6 Will. 4, c. 54, recites that "marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated \*between persons within the prohibited degrees of con- [ \*156 ] sanguinity or affinity should be *ipso facto* void, and not merely voidable; and then enacts, that all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity shall not hereafter be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit which shall be depending at the time of the passing of this act (31st August, 1835); provided that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity." It further enacts,(f) that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever. It provides(g) that nothing in this act shall be construed to extend to that part of the United Kingdom called Scotland.(h)

mentur; et ita quo quisque gradu consanguinitatis quemque contingit, eodem ejus uxorem continget affinitatis gradu, quod etiam in contrariam partem eadem ratione, valet. *Reformatio Legum*, tit. 22, c. 1.

(e) 5 & 6 Will. 4, c. 54.

(f) Sect. 2.

(g) Sect. 3.

(h) This act does not alter or define the degrees of affinity and consanguinity, which are left as before; although something passed in the debates in the House of Commons, with respect to its being advisable to introduce a measure for that purpose. *Hans. Parl. Deb.* 30th vol. 3d ser. 949. It was proposed in the House of Commons, to except from the second clause of the act the case of a man desiring to marry the sister of his deceased wife. In the debates upon the bill, it was observed with respect to what are called the prohibited degrees, there were some doubts whether these degrees were such as were prohibited by Scripture, as, for instance, where the husband marries the sister of his former wife. Our courts of law, ecclesiastical and common, have decided that a marriage within those degrees was illegal.

*Hans. Parl. Deb.* 28th vol. 3d ser. p. 204. Sir William Follett said, "that he believed that the particular relation stood within the same degree as many others condemned by the marriage law, as the brother's wife or the niece of the deceased wife. And although many were of opinion that the case of the sister of a deceased wife came not within the prohibited degrees, he could not help thinking, though undoubtedly many marriages of that kind had proved happy, it would lead to great evil were it to be understood that such marriages would be valid." *Hans. Parl. Deb.* 30th vol. 3d ser. 792. 948—952. See post, p. 166, n. (e)

*Doubtful whether marriages of Jews within the above act.*—In consequence of doubts which had arisen, whether the marriages of Jews are or are not affected by the above act, a bill was introduced, in June, 1837, but did not pass, in the House of Commons, by Mr. Buxton and Dr. Lushington, for removing such doubts. It recited the above act, and that the marriages of persons professing the Jewish religion have been excepted, by divers acts of parliament passed for the regulation of marriage, from the op-



[ \*157 ] \*Marriages liable to be objected to on the ground of the affinity of the parties, are by this statute generally made completely valid to all intents and purposes, unless there was a suit depending at the time of the passing of the act, and the burthen of bringing the case within the exception falls on the promoter of the suit. The object of the legislature, to be collected from the words of the statute, was, in the first place, to prevent such marriages in future, by rendering all such marriages null and void; and, secondly, to prevent the uncertainty which existed under the old law, as to the *status* and condition of children, and the rights they have. This is not done absolutely in all cases, but only where no suit was depending at the time of the passing of the act.

*Foundation of the Rule prohibiting Marriages between near Relations.*—We have already adverted(*g*) to the general prevalence of laws prohibiting marriages between near relations, and now proceed to consider to what extent this rule prevails in this country.

Incest, or the crime of carnal knowledge between persons who are near of kin, has been forbidden in a greater or less extent by the general custom of all communities, and even in times very little advanced in civilization. Thus, the source of this law seems to lie in the native feelings of the human constitution, and not merely in those views of policy and discipline, though obvious and strong, which recommend the enforcing such a restraint(*h*)

[ \*158 ] \*The degrees prohibited by the Levitical law are such as are said to be against the law of nature, and such as are against the Divine positive law. Those against the law of nature are all marriages between the ascending and descending line *in infinitum*, and this is said to be contrary to the law of nature, because it tends to the destruction of the natural will of the Creator, which designed the preservation and continuance of such inhabitants of the world as he originally created, and all acts of men that tend to the destruction of such species, as the murder of an innocent person, are said to be against the law of nature; and therefore incest between the ascending and descending line, is contrary to the law of nature; for the mother would never have preserved and educated the female issue, if it had been admitted to the father to have had access to them: and fathers would never have educated and preserved their male

ration of the same acts, and have been always contracted and solemnized according to the usages of persons of the said religion, and the said usages prohibit marriages by reason of consanguinity or affinity so far only as the same are prohibited by the law of Moses, as interpreted among the same persons. It then recites the stat. 6 & 7 Will. 4, c. 85, s. 2, ante, p. 65, and that doubts have arisen whether the marriages of Jews are or are not affected by the provisions of the above act; and that it was desirable that such doubts should be removed; and then proposed to enact that no marriage already or hereafter to be celebrated between any two persons professing the Jewish religion shall be impeached or rendered void or voidable by reason of consanguinity or affinity, unless the same be within the degrees of consanguinity or affin-

ity prohibited by the Mosaic law, according to its interpretation as received by persons of the said religion; the first hereinbefore recited act, or any other act, rule, or custom of law whatsoever to the contrary thereof in anywise notwithstanding. It is said, Vaugh. 241, 312, that within the meaning of the 18th chapter of Leviticus, and the constant practice of the commonwealth of the Jews, a man was prohibited not to marry his wife's sister only during her life. The text is, "Neither shalt thou take a wife to her sister to vex her, to uncover her nakedness beside the other in her lifetime." Lev. c. xviii. v. 18.

(*g*) Ante, p. 127.

(*h*) See Hume's Comm. on Laws of Scotland, respecting Crimes, vol. i. p. 446; Dwight's Hebrew Wife, 67.

issue, if they might have ascended the bed of their mothers. There is also another reason why this is called unnatural, and that is, because it destroys the natural duties between parents and children; for the parent could never preserve or maintain that authority that is necessary for the education and government of his child, nor the child that reverence that is due to the parent, in order to be educated and governed, if such indecent familiarities were admitted. There likewise seems to be a natural reason against this or any near intercourse between collaterals, which is drawn from that which is observed in brute creatures; viz. that it is necessary to cross the strain, in order to continue the species. It may be, that there being the same tone and figure in the blood, and a similar conformation of vessels, the circulation of it becomes torpid and inactive; whereas a new mixture of others of the same kind, where there is a different figure and motion of the blood and spirits, may add a new vigour and ability to the animal economy, which may also be a natural reason against such sort of incest.(i)

\*Those prohibited by the positive Divine law, are all [ \*159 ] collaterals to the third degree; and though this be not contrary to the law of nature, yet it seems established on very strong reasons, for if a concourse between brothers and sisters might be allowed, or their marriages be tolerated, the necessity there is that they should be educated together, and the frequent opportunities they have with each other, would fill every family with lewdness, and create heart-burnings and unextinguishable jealousies between brothers and sisters, where the family was numerous; and it would confine every family to itself, and hinder the propagating common love and charity among mankind, because there would be a danger of taking a wife out of any family, if women were liable to be corrupted by such vicious freedoms. This prohibition is likewise carried to uncles and aunts, nephews and nieces; because, upon the death of the father and mother, they come into the education of the children *loco parentum*; and by consequence it was necessary to propagate the same reverence of blood in such near degrees, that the uncle might have the same regard and command as a father, and a niece the same duty as a daughter. It was also necessary, in order to perfect the union of marriage, that the husband should take the wife's relations, in the same degree to be the same as his own, without distinction, and so *vice versa*; for if they are to be the same person, as was intended by the law of God, they can have no difference in relations, and by consequence, the prohibition touching affinity must be carried as far as the prohibition touching consanguinity.(j)

It is observed by a popular writer, in order to preserve chastity in families, and between persons of different sexes, brought up and living

(i) Degeneracy is said to be the consequence of marriages between near relations. It is observed by Mr. Southey, in giving the character of the modern Spanish and Portuguese nobility, "The long continued moral deterioration of the privileged classes had produced, in many instances, a visible physical degeneracy; and this tendency was increased by those incestuous marriages, common in both countries, which pride and

avarice had introduced, and for which the sanction of an immoral church was to be purchased." 1 Southey's History of the Peninsular War, 6; 1 Paris & Fonbl. Med. Jur. 168.

(j) Gilb. Rep. 157, 158; Vaugh. 221, 242; See Bac. Abr. Marriage (A); Puffendorff, book 6, ch. 1, ss. 32, 36; Montesquieu, book 26, ch. 14.

together in a state of unreserved intimacy, it is necessary, by every method possible, to inculcate an abhorrence of incestuous conjunctions; which abhorrence can only be upholden by the absolute reprobation of all commerce of the sexes between near relations. Upon this principle, the marriage as well as other cohabitations of brothers [ \*160 ] and sisters, \*of lineal kindred, and of all who usually live in the same family, may be said to be forbidden by the law of nature.

Restrictions which extend to remoter degrees of kindred than what this reason makes it necessary to prohibit from intermarriage, are founded in the authority of the positive law which ordains them, and can only be justified by their tendency to diffuse wealth, to connect families, or to promote some political advantage.(k)

*Different Modes of computing Degrees.*—Marriage in England is forbidden only between such persons as are prohibited to marry by the Levitical law, which is adjudged, in the collateral lines, to extend no further than the third degree. But the prohibition is equally binding, whether the persons are related by affinity or consanguinity.

The civil law regards consanguinity principally with respect to successions; and therein very naturally considers only *the person deceased*, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived *from him*.

The canon law regards consanguinity principally with a view to prevent incestuous marriages between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood as the *common ancestor*.(l)

In computing the degrees according to the Roman law, every person who was generated made a degree, without reckoning the common stock. By this rule, father and son were in the first degree of consanguinity, because the son is the only person generated: brothers in the second, uncle and nephew in the third, and first cousins or cousins german in the fourth, and second cousins in the sixth.

The computation of the degrees of propinquity in the canon law agrees precisely with that in the Roman, in the direct or right line of ascendants and descendants; but in the collateral the canonists compute, not by the number of persons descended on both sides, from the common stock, but by the number of generations upon one side only.

[ \*161 ] According to this \*reckoning cousins-german are in the second degree, because each of them is but two generations distant from the grandfather, who is the common stock; whereas they are by the Roman rule in the fourth. In the unequal collateral line, where one of the two is farther removed than the other from the common stock, the canon law reckons the distance by the number of generations of the person farthest removed. Thus a niece is related in the second degree to her uncle, because she is related in the second degree to her grandfather, the common stock, and by the same rule she is no farther removed from her uncle's son; which abundantly discovers the absurdity of that mode of reckoning.(m)

(k) Paley's Moral and Political Philosophy, book 3, part 3, ch. 5, p. 311, 20th ed.  
(l) 2 Bl. Comm. 224.

(m) Ersk. Inst. book 1, tit. 6, s. 8. See 1 Browne's Civil Law, 61, 64; Wood's Civil Law, 116, 117; Taylor's Civil Law, 330, 332.

By the old canon law, and the early decretals, marriages were prohibited down as far as the seventh degree; that is, persons who might be by the civil law computation in the twelfth degree to one another, were prohibited marriage by reason of too great proximity of blood. This prohibition was reduced to the fourth degree, <sup>(n)</sup> at which it now stands in countries where the canon law prevails by the fourth council of Lateran, which was held in the year 1215. The canon law prohibits in the fourth degree, which is that of second cousins, and the civil allows in the same degree, which, according to the civil law computation, is that of first cousins. And this perhaps accounts for a vulgar apprehension which is said to have prevailed in this kingdom, that first cousins may marry but second cousins may not. <sup>(o)</sup>

\*The laws of England agree with the civil law in this [ \*162 ] instance, and both with the Levitical. <sup>(p)</sup>

The relations of the husband stand in the same degree of affinity to the wife, in which they are related to the husband by consanguinity; which rule holds also, *è converso*, in the case of the wife's relations. Thus where one is brother by blood to the wife, he is brother in law, or by affinity, to the husband. But there is no affinity between the husband's brother and the wife's sister, which is called by doctors *affinitas affinitatis*; because there the connection is formed not between one of the spouses and the kinsmen of the other, but between the kinsmen of both. <sup>(q)</sup>

The Levitical computation of degrees is the same as the computation in the civil law, by which there are counted as many degrees as there are persons, the common stock not being reckoned. This was also the ancient manner of computing by the canon law, according to some authors, who suppose that Pope Alexander the Second, perceiving dispensations to be greatly lucrative to the church, and being at the same time conscious that it had universally obtained that persons might marry in the fourth degree, began a new computation, according to which the canonists have since reckoned all degrees, in the *equal transversal* lines from the common stock on one only; and in the *unequal transversal* lines, according to the distance of that person who is remotest from the common stock. <sup>(r)</sup>

It is evident from this alteration in, or revival of, the canon law, that not only first cousins, but also second and third cousins, were

In linea recta jus civile et et canonicum conspirant. Tot enim utrumque numerat gradus, quot sũt generationes. Hinc pater et filia uno, avus et neptis duobus; proavia et pronepos tribus gradibus distant. In linea obliqua jus civile eandem servat regulam. Canonicum distinguit inter lineam obliquam, *equalem et inaequalem*, et de illa suppletur axioma: quot gradibus personæ cognatæ distant a communi stipite tot gradibus inter se distant. Hinc frater a sorore jure civili distat secundo: jure canonico primo gradu consobriini jure civili quarto; jure canonico secundo gradu. De inaequali linea regulam habet; quot gradibus persona remotior distat a communi stipite, tot gradibus personæ

distant inter se. Hinc, e. g. avi soror cognata mihi est gradu quarto juris civilis, gradu tertio juris canonici.—Heineccius Elem. lib. 1, tit. 10, de Nuptiis, ss. 154, 155. See Voet, lib. 23, tit. 2, s. 29.

<sup>(n)</sup> Sim. Van. Leewen Cens. For. L. 13, n. 19; Carpzov. Jurisprud. Eccl. L. 2, def. 78; Gibs. Cod. 497.

<sup>(o)</sup> Taylor's Civil Law, 331; Wood's Civil Law, 117.

<sup>(p)</sup> Inst. 24 a.

<sup>(q)</sup> Ersk. Inst. book 1, tit. 6, s. 8.

<sup>(r)</sup> Decret. part 2, caus. 35, q. 5; Harris's Justinian, lib. 1, tit. 10, p. 29, 30. See Gilb. R. 159.

prohibited from matrimony; nor is it less evident that so extensive a prohibition must have caused frequent dispensations.

*Statutes limiting the prohibited Degrees.*

The intention of the statutes, which will now be mentioned, and upon which the computation of degrees is at present founded, was to restore the Levitical computation.

[ \*163 ] \*By statute 25 Hen. 8, c. 22, ss. 3, 4,(s) it is enacted as follows: Since many inconveniences have fallen by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the step-mother; the brother the sister; the father the son's daughter, or his daughter's daughter; or the son to marry the daughter of his father's procreate, and born by his stepmother; or the son to marry his aunt, being his father's or mother's sister; or to marry his uncle's wife; or the father to marry his son's wife; or the brother to marry his brother's wife; or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; which marriages albeit they be prohibited by the laws of God, yet nevertheless at some time they have proceeded under colour of dispensation by man's power; it is enacted, that no person shall from henceforth marry within the said degrees.

Provided, that this article concerning prohibitions of marriages within the degrees aforementioned shall always be taken and interpreted of such marriages, where marriages were solemnized, and carnal knowledge was had.—s. 14.

And by the 28 Hen. 8, c. 7, s. 7,(t) it is in like manner enacted thus: Since many inconveniences have fallen by reason of the marrying within the degrees of marriage prohibited by God's law, that is to say, the son to marry the mother, or the stepmother carnally known by his father; the brother the sister; the father his son's daughter, or his daughter's daughter; or the son to marry the daughter of his father, procreate, and born by his stepmother; or the son to marry his aunt, being his father's or mother's sister; or to marry his uncle's wife, carnally known by his uncle; or the father to marry his son's [ \*164 ] wife, carnally known by his son; or the brother to marry \*his brother's wife, carnally known by his brother; or any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister.

And further to declare the meaning of these prohibitions, it is to be understood, that if it chance any man to know carnally any woman, that then all and singular persons, being in any degree of consan-

(s) Dr. Gibson says the above act is repealed by the 28 Hen. 8, c. 7, s. 3, and by the 1 Mar. sess. 2, c. 1, s. 3, and which Mr. Kay takes notice of as repealed, but which Mr. Hawkins and Mr. Raithby insert in their edition of the statutes, as being in force and unrepealed.

(t) This statute is not in the collection of Mr. Hawkins, Mr. Kay or Mr. Raithby;

and Dr. Gibson (Gibb. Cod. 496) thinks it to be repealed; but which, in the cases of *Harrison and Burwell*, Vaugh. 215; 2 Vent. 11; and *Hill v. Good*, Vaugh. 325, is said to be unrepealed. This act was repealed by 1 & 2 P. & M. c. 8, s. 4, so far as concerned a prohibition to marry within the prohibited degrees, and does not appear to have been revived. See stat. 1 Eliz. c. 1, s. 4.

guinity or affinity, as is above written, to any of the parties so carnally offending, shall be deemed to be within the cases and limits of the said prohibitions of marriage; all which marriages, albeit they be prohibited by the laws of God, yet sometimes have proceeded under colour of dispensation by man's power; it is enacted, that from henceforth no person shall marry within the degrees afore rehearsed.—ss. 10 & 11.

And by 32 Hen. 8, c. 38,(u) all such marriages as shall be contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry) such marriages being contracted and solemnized in the face of the church, and consummate with bodily knowledge or fruit of children or child being had therein, between the parties so married, shall be deemed lawful, just, and indissoluble; notwithstanding any pre-contract not consummate with bodily knowledge, which either of the parties so married or both shall have made, with any other person, before the time of contracting that marriage, which is solemnized and consummate, or whereof such fruit is ensued or may ensue as aforesaid; and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by act or otherwise; and no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees; and no person shall be admitted in the spiritual court to any process, plea or allegation to the contrary.

The latter act differs from the preceding in this, that if any man carnally know any woman, all persons in any degree of [ \*165 ] \*consanguinity or affinity of the parties so offending are within the prohibition, in like manner as if the parties carnally knowing one another had been married; for example if a man carnally know a woman, not marrying her, he is prohibited to marry her daughter or daughter's daughter, or *à converso*. In other respects the two statutes agree. The stat. 28 Hen. 8, c. 7, is said to be in force.(x) And by the 2 & 3 Ed. 6, c. 23, before mentioned, it is thus enacted, as concerning precontracts, the said statute of the 32 Hen. 8, c. 38, shall be repealed, and be of no force or effect, and be reduced to the estate and order of the king's ecclesiastical laws of this realm; so that when any cause or contract of marriage is pretended to have been made, it shall be lawful for the king's ecclesiastical judge of that place to hear and examine the said cause, and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnization, cohabitation, consummation, and tractation, as becometh man and wife to have, with inflicting all such pains upon the disobedients and disturbers thereof, as before the statute he might have done.(y) Provided, that this act do not extend to make good any of the other causes, to the dissolution

(u) This act was repealed by 2 & 3 Edw. 6, c. 23, so far as relates to the not annulling marriages for cause of pre-contract, and confirmed as to the other parts of it. By 1 & 2 P. & M. c. 8, s. 4, this act was wholly repealed. By 1 Eliz. c. 1, s. 3, so much of this act is revived as was not repealed by 2

& 3 Edw. 6, c. 23.

(x) Vaugh. 215. It is said that the statute 28 Hen. 8, c. 7, was revived by the reviver of the 28 Hen. 8, c. 16, in 1 Eliz., and made as effectual as before it was repealed, and so it continues; Vaugh. 325.

(y) Section 2.

or disannulling of matrimony, which be in the said act spoken of and disannulled; but that in all other causes, and other things therein mentioned, the said act do stand in force.(z)

The 33 Hen. 8, c. 6, (Ir.) is the statute in Ireland corresponding exactly with 32 Hen. 8, c. 38; the Irish statute was repealed by 3 & 4 Ph. & M. c. 8, (Ir.) but is revived as to so much only as concerns degrees of consanguinity by 2 Eliz. c. 1, s. 2, (Ir.)(a.)

The object of these acts is to prevent the impeaching marriages for consanguinity or affinity without the Levitical degrees. The words, "God's law except," refer to cases of natural impotency, polygamy and adultery; for if the act had been general, that no marriage shall be impeached without \*the Levitical degrees, [ \*166 ] it might have included cases of that description. Previously to these statutes, the distinction between lawful and unlawful marriages certainly existed in this country, and the lawfulness of them depended upon the divine law and the canon law, to judge of which the common law judges had no cognizance. No instance of any prohibition of the spiritual court for questioning a marriage, can be found before these acts.(b) Since the stat. 32 Hen. 8, c. 38, it has been clearly agreed, that if the spiritual courts proceed to impeach or dissolve a marriage out of the Levitical degrees, that then the temporal courts are to prohibit them; for by that statute all marriages that are out of those degrees are declared to be good and lawful; and, therefore, if the spiritual court molest persons in doing that which is declared lawful to be done by the statutes of the realm, they are by the temporal courts to be prohibited, because they exceed their jurisdiction, thus bounded by the temporal law; but where the law has not bounded them, their jurisdiction still continues; and, therefore within the Levitical degrees they are still judges of incest.(c)

The degrees of proximity specified in the 18th chapter of Leviticus, are, by the statute 32 Hen. 8, c. 38, adopted as the legal degrees of marriages in the divine law. The law in Leviticus(d) is, "that none of you shall approach to any that is next of kin to uncover their [ \*167 ] nakedness,"(e) which words \*being general, must be understood and expounded by the examples from the 6th to

(z) Section 4.

(a) See 1 Browne's Civil Law, 64.

(b) Vaugh. 213.

(c) *Butler v. Gastrell*, Gilb. R. 156; *Harrison v. Burwell*, Vaugh. 206.

(d) Chap. 18, v. 6.

(e) It has been contended that this expression is never used throughout Scripture to signify *marriage*, but the contrary expression is always used in the case of marriage, viz. spreading a skirt over a woman and covering the nakedness. Dr. Hammond Mr. Poole, Bishop Patrick, Mr. Pyle. Thus in Ruth, c. 3, v. 9, "Spread thy skirt over the handmaid," or, as explained by Mr. Poole on Ruth, "take me to be thy wife, and perform the duty of a husband unto me." So Ezekiel, c. 16, v. 8, "When I passed by thee, and looked upon thee, behold thy time was the time of love; and I spread my shirt over thee, and covered thy nakedness; yea, I

swear unto thee saith the Lord God, and thou becamest mine." On the other hand, several texts of Scripture are cited for showing that uncovering the nakedness means, when used for carnal knowledge, not the lawful use of the marriage-bed, but adultery or fornication; Ezekiel, c. 16, v. 15—34; Ib. c. 23; Isaiah, c. 47, v. 1, 3; Ib. c. 3, v. 16, 17; Jeremiah, c. 13, v. 22, 26, 27; Nahum, c. 3, v. 4, 5. See the case of Marriages between near Kindred. London, 1756, 8vo. The celebrated Sir William Jones, in a letter says, "I cannot help believing that the whole chapter from which our degrees of marriage are called *Levitical*, contains the laws against all obscenity whatever, but especially against the *unnatural prostitutions* committed by the idolaters of Canaan and Egypt." It has been contended, that the sentence wherein the Levitical degrees are mentioned, proceeds upon the

the 20th verse, among which are many prohibitions to collaterals in the third degree, both in affinity, and consanguinity; but there is no example of collaterals in the fourth degree, either in affinity or consanguinity, and therefore the law of marriage opens to relations in the fourth degree; and the Jewish lawyers, in computing their degrees, computed them according to the natural order of things; that is from the *propositus* up to the common stock, and so down to the other relations. (f) By this mode of computation, all marriages of collaterals in the third degree are unlawful, and all marriages in the fourth degree are lawful. (g)

*Table of Degrees.*—The provision in the statute 32 Hen. 8, c. 38, that no prohibition, God's laws excepted, shall impeach any marriage without the Levitical degrees, was defined \*and reduced [ \*168 ] to a greater certainty by a table framed not merely according to the letter, but according to the spirit of the Levitical law. This table was set forth by Archbishop Parker, and published in the year 1563, and is usually called Archbishop Parker's Table of Degrees. The 99th canon of 1603 refers to this table, and declares that "No persons shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year 1563; (h) \*and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be [ \*169 ]

idea of those degrees being by divine law, the legal degrees of marriage, and are adopted by the legislature as illustrations of the law of God, and not made the limit of legal marriage by the political laws of England. That the expression, Levitical degrees, being a general one, and adopted as the general law of marriage, may have particular exceptions; and if, therefore, any instance can be put wherein it may appear that a marriage, though within those degrees, be nevertheless divinely legal, that then such marriage would be protected by the 32 Hen. 8, c. 38, against any ecclesiastical prohibition. A very learned argument upon this subject was published by Mr. Alleyne, entitled, *The Legal Degrees of Marriage*, stated and considered. London, 1810, 3d ed. The object of the argument is to show by a critical examination of the 11th chapter of Leviticus, and a comparison of it with the 25th chapter of Deuteronomy, (which especially enjoins a marriage with the wife of a deceased brother,) that the former relates not to prohibitions of marriage, but to adultery. This construction is approved by the correspondence of several eminent scholars, and, amongst others, Sir William Jones, and several English divines, contained in the

Appendix to the above work. It is also argued, that the mention of the Levitical degrees, in the 32d Hen. 8, is only by way of instance, and not as a legislative enactment, that those degrees shall be considered as marking the prohibitions by the divine law. The treatise was written with a view to the obtaining a declaratory act upon the subject for confirming such marriages.

(f) *Selden Uxor Hebraica*, lib. 1, c. 4.

(g) Gilb. 158.

(h) The table set forth in the year 1563 is as follows:

"An admonition to all such as shall intend hereafter to enter the state of matrimony godly and agreeable to the laws.

"First, that they contract not with such persons as be hereafter expressed, nor with any of like degree, against the law of God, and the laws of the realm.

"Secondly, that they make no secret contracts, without consent and counsel of their parents or elders, under whose authority they be, contrary to God's laws and man's ordinances.

"Thirdly, that they contract not anew with any other, upon divorce and separation made by the judge for a time, the laws yet standing to the contrary.

A man may not marry his

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.

A woman may not marry her

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother.
5. Mother's brother.



dissolved, as void from the beginning, and the parties so married shall by course of law be separated."

*Construction of the Statutes as to prohibited Degrees.*—For the better understanding of these prohibitions, with the grounds and limitations of them, the following special rules are mentioned by Gibson as having been laid down both by lawyers and divines:

First, that marriages in the ascending and descending line,<sup>(i)</sup> that is, of children with their father, grandfather, mother, grandmother, and so upwards, are prohibited without limit; because they are the cause (immediate or mediate) of their being: and it is directly repugnant to the order of their nature, which hath assigned several duties and offices essential to each, that would thereby be inverted and overthrown. A parent cannot obey a child; and therefore it is unnatural that a parent should be a wife to a child. A parent, as a parent, hath a natural right to command and correct a child; and that a child, as husband, should command and correct the same parent is unnatural.<sup>(k)</sup> To which we may add, the inconsistency, absurdity, and monstrousness of the relations to be begotten if such prohibition were not absolute and unlimited. The son or daughter, for instance, born of the mother, and begotten by the son, considered as born of the mother, would be a brother or sister to the father; but as begotten by him would be a son or daughter. So the issue procreate upon the

6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.
10. Mother.
11. Stepmother.
12. Wife's mother.
13. Daughter.
14. Wife's daughter.
15. Son's wife.
16. Sister.
17. Wife's sister.
18. Brother's wife.
19. Son's daughter.
20. Daughter's daughter.
21. Son's son's wife.
22. Daughter's son's wife.
23. Wife's son's daughter.
24. Wife's daughter's daughter.
25. Brother's daughter.
26. Sister's daughter.
27. Brother's son's wife.
28. Sister's son's wife.
29. Wife's brother's daughter.
30. Wife's sister's daughter.

6. Father's sister's husband.
7. Mother's sister's husband.
8. Husband's father's brother.
9. Husband's mother's brother.
10. Father.
11. Stepfather.
12. Husband's father.
13. Son.
14. Husband's son.
15. Daughter's husband.
16. Brother.
17. Husband's brother.
18. Sister's husband.
19. Son's son.
20. Daughter's son.
21. Son's daughter's husband.
22. Daughter's daughter's husband.
23. Husband's son's son.
24. Husband's daughter's son.
25. Brother's son.
26. Sister's son.
27. Brother's daughter's husband.
28. Sister's daughter's husband.
29. Husband's brother's son.
30. Husband's sister's son.

(i) Marriage in the ascending and descending line is prohibited without limit, not so between collaterals. *Harrison v. Burwell*, 2 Ventr. 18. Prima regula est, nuptiæ inter adscendentes et descendentes in lineâ rectâ in infinitum prohibentur quam regulam et canones et ob mores hodierni sequuntur. Altera regula est, in lineâ obliquâ æquali jure civili secundus gradus semper est prohibitus, quartus permittitur; in inæquali tertius semper prohibitus, quartus

et reliqui tantum inter eas personas sibi invicem parentum ac liberorum loco sunt. At jus canonicum prohibitionem ad gradum quartum suse computationis extendit idque in lineâ æquali. Nam in inæquali respectus parentelæ etiam ulterius impedit nuptias. Heineccius Elem. Jur. Nat. lib. 1, tit. 10, per Nuptiis, ss. 158, 159.

(k) See Grotius de Jure Belli et Pacis, lib. 2, c. 5.

grandmother, as born of the grandmother, will be uncles or aunts to the father; but as begot by the son, they will be sons or daughters to him, and this \*in the first degrees of kindred. Further, [ \*170 ] there are several degrees which, although not expressly named in the Levitical law, are yet prohibited by that, and by the statute of 32 Hen. 8, c. 38, by parity of reason, which is thus illustrated in the *Reformatio Legum*:<sup>(l)</sup> This in the Levitical degrees is to be observed, that all the degrees by name are not expressly set down; for the Holy Ghost there did only declare plainly and clearly such degrees, from whence the rest might evidently be deduced. As, for example, where it is prohibited that the son shall not marry his mother, it followeth also, that the daughter shall not marry her father. And by enjoining that a woman shall not marry her father's brother, the like reason requireth that she shall not marry her mother's brother. To which the same book adds two particular rules, for our direction in this matter: 1. That the degrees which are laid down as to men, will hold equally as to women in the same proximity. 2. That the husband and wife are but one flesh; so that he who is related to the one by consanguinity, is related to the other by affinity in the same degree.<sup>(m)</sup>

Upon the foregoing rule, from parity of reason, rests the prohibition against marrying a wife's sister, which is well expressed by Bishop Jewel in his printed letter upon that point: "Albeit," says he, "I be not forbidden by plain words to marry my wife's sister, yet I am forbidden so to do by other words, which by exposition are plain enough. For when God commands me that I shall not marry my brother's wife, it follows directly by the same, that he forbids me to marry my wife's sister. For between one man and two sisters, and one woman and two brothers, is like analogy or proportion." And when this point of marrying the wife's sister came under consideration in the case of *Hill v. Good*,<sup>(n)</sup> though it was alleged that the precept *prima facie* seemed to be only against having two sisters at the same time, and prohibition to the spiritual court was granted, yet afterwards, after hearing civilians, a consultation was granted as in a matter within the statute of 32 Hen. 8, though the former statute of 28 Hen. 8 had never been revived, which yet it virtually was; and there, as in the \*statute of 25 Hen. 8, the wife's sister is [ \*171 ] expressly prohibited.<sup>(o)</sup>

It is now most clearly settled, that a marriage between a man and his late wife's sister is incestuous, as being within the prohibited degrees. In a recent case for setting aside a marriage on that ground,

(l) Fol. 23, a.

(m) Gibs. Cod. 498.

(n) Vaugh. 305.

(o) Gibs. 412; Vaugh. 302; 3 Keb. 166. "In this case Vaughan, C. J. affirmed, 1st, the marriage to be expressly prohibited in the 18th Leviticus, and then it must be within the Levitical degrees; 2dly, if it were not so prohibited, yet it is not a marriage without those degrees, but within them; and therefore no prohibition would lie for im-

peaching it; for marriages not to be impeached must be without the degrees, and for that some marriages within the degrees may be lawful; 3dly, that if the marriage be without the Levitical degrees, yet it is a marriage prohibited by God's law, and therefore to be impeached, notwithstanding the stat. 32 Hen. 8, whose words are, "no marriage, God's law excepted, shall be impeached without the Levitical degrees." Vaugh. R. 305.

the libel in the first place pleaded the marriage of the father and mother of the party in the suit in October, 1799; it pleaded the birth of several children, and amongst others of a daughter born on the 4th January, 1807, and baptized Anna Rachel Louisa, and who was the first wife of Mr. Sherwood. It then pleaded the birth of another daughter on the 14th June, 1812, who was baptized Emma Sarah, and who was the party in the cause; so that, at the date of the marriage, she was not a minor but of full age. The libel then pleaded the marriage of the elder of the two sisters on the 17th July, 1827, at the parish of St. George, Bloomsbury, by license; and that the issue of that marriage were two children, both living. It pleaded the death of Mrs. Sherwood, the first wife, on the 3d April, 1834, and then set forth the law applicable to the question before the court, namely, the law and canons ecclesiastical, then in full force in this kingdom, particularly the 99th canon of 1603, as to marriages within the prohibited degrees. It then pleaded, that by the first table of the degrees of marriage, set forth by Archbishop Parker, in the year 1563, it is expressly ordered that a man may not marry his wife's sister; and it then referred to the canon and table. The 10th article of the libel pleaded, that immediately after the marriage, for the purpose of preventing the marriage coming to the knowledge of the father and her family, and as previously arranged, Miss Ray returned [ \*172 ] \*to her father's house, and continued to live and reside with him and his family as she had theretofore done; that she and Mr. Sherwood concealed from them the fact of marriage, as well as their previous intention to be married; and that the same was not discovered till the 22d of August following, the citation being extracted on the 24th of that month, the intervening day between the discovery and the 24th being a Sunday, so that no step could have been taken earlier after the marriage was discovered; and the last article concluded with praying "that the marriage so had may be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law, from the beginning, by reason of incest, in pursuance of and in conformity with the aforesaid 99th canon, and laws ecclesiastical of this realm; and that the parties proceeded against may be condemned in the costs of the proceedings. The marriage was pronounced to be void by the Archæ Court, (p) and that sentence was affirmed on appeal by the judicial committee of the privy council. (q)

The marriage of a widow with the brother of the deceased husband is prohibited by law, and such a marriage, when set aside by the ecclesiastical court, being void *ab initio*, gives the husband no right over the property of the wife. (r)

The same rule concerning parity of reason prohibits the uncle to marry his niece, which though not expressly forbidden, is virtually prohibited in the precept that forbids the nephew to marry the aunt; nor is it of moment to allege that the first is a more favourable case,

(p) *Ray v. Sherwood*, 1 Curteis, 173. The principal points in this case, which were, whether a suit was pending at the time the stat. 5 & 6 Will. 4, c. 54, ante, p. 156, passed, and whether the father of the

lady had a sufficient interest to sustain a suit for setting aside the marriage, will be hereafter noticed, pp. 179—182.

(q) 6th December, 1837.

(r) *Aughtie v. Aughtie*, 1 Phill. R. 201.

as the natural superiority is preserved; since the parity of degree, which is the proper degree of judging, is the very same.(s)

A nephew by affinity is within the prohibited degrees, as where the husband was the sister's son of the woman's former husband.(t)

\*Soon after the passing of the 32 Hen. 8, c. 38, Lord Cromwell applied for a dispensation for a party who had [ \*173 ] contracted to marry the sister's daughter of his late wife; but the archbishop refused it, as contrary to the law of God; for as it is expressed that the nephew shall not marry his uncle's wife, it is implied, by parity of reason, that the niece shall not be married to the aunt's husband.(u)

There are instances in which a prohibition had been granted to the ecclesiastical court, and a consultation awarded in cases of marriages upon the same proximity.(x)

But in *Denney v. Ashwell*,(y) the court refused a prohibition to a suit in the spiritual court for marrying his wife's sister's daughter. Such a marriage had previously been held to be incestuous.(z)

It is therefore settled that a man cannot marry his wife's sister's daughter, for by affinity, he is(a) in the same degree as an uncle to his niece by consanguinity.

The marriage of a man with the daughter of his deceased wife by a former husband, was declared to be null and void, in a suit promoted by the churchwardens of the parish against the husband for incest, and the parties were ordered to do the usual penance, and to pay the costs of the suit.(b)

The marriage with the wife's mother's sister is incestuous.(c)

The libel was exhibited for the marriage of E. with his now wife, being the daughter of the sister of his former wife.(d)

But the marriage of a man with the widow of his great uncle was held to be good, because it is in the fourth degree, and by stat. 32 Hen. 3, c. 38, cousins-german, who are in the same degree are allowed to marry.(e)

\*The kindred of the husband are not of affinity to the kindred of the wife; and therefore the husband's brother [ \*174 ] may marry the wife's sister, as well as the husband's son by a former wife may marry the wife's daughter by a former husband. The affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred.(f)

On a motion for a prohibition to the court of the bishop of Oxford, for presenting J. S. for incest, who had married the daughter of his brother of the half-blood, it was resolved that no prohibition should go; for the court said, though the brothers were not of the whole blood, yet were they brothers, and therefore the marriage incestuous:

(s) Gibs. Cod. 413.

(t) *Elliott v. Gurr*, 2 Phill. R. 16.

(u) Gibs. Cod. 412.

(x) *Morris's case*, Cro. Eliz. 228; Leon. 16; Moody, 907; *Watkinson v. Mergatran*, Sir T. Raymond, 464; 3 Keb. 660; 2 Lev. 254; Sir T. Jones, 118; Show. 70; *Howard v. Chancellor of Salisbury*, 1 Mod. 25.

(y) Str. 53.

(z) *Snowling v. Nursey*, 2 Lutw. 1075.

(a) *Clement v. Beard*, 5 Mod. 448; Co. Litt. 235; 2 Jones, 191; Noy, 29; Hob. 181; Vaugh. 303.

(b) *Blackmore v. Brider*, 2 Phill. R. 359.

(c) *Butler v. Gastrill*, Gilb. 156.

(d) *Ellerton v. Gastrell*, Com. R. 318.

(e) *Harrison v. Burwell*, Vaugh. 206; 2 Vent. 9; Gibs. Cod. 413.

(f) Wood Civ. L. 119; Taylor's Civ. L. 339.

they agreed, that if the father marries the mother, and the son the daughter, this was lawful enough; and North cited the case of the Earl of Manchester, who had married his great aunt's husband's second wife; and this was held by divines and civilians a good marriage, for *affinis mei affinis non est mihi affinis.*(g)

*Illegitimate Children.*—Consanguinity or affinity is equally an impediment where the children are illegitimate.(h) “Nec intererit quod ad consanguinitatem vel affinitatem contrahendam ex justis nuptiis aliqui an ex damnato coitu invicem copulati fuerint.(i) Cognati sunt qui a communi stipite descendunt, sive ex justis nuptiis ea cognatio sit, sive ea illegitimo coitu.”

On a motion for a prohibition for proceeding against a person in the ecclesiastical court, who had married his sister's bastard daughter, it was urged for the prohibition that the Levitical law could not extend to a bastard, because he is of kin to no person whatever, and the court inclined not to grant the prohibition.(k) Although a bastard, being the first of his family, has no relation of which the law takes notice; this must be understood principally for *civil* purposes, as rights [ \*175 ] of inheritance and succession to property,(l) for he has relations \*for *moral* purposes, and therefore he cannot marry his own mother or bastard sister.(m) Lord Stowell observed, “According to the general policy of the law in matters merely moral, a person is said to be restrained from marriage with illegitimate relations, as much as with legitimate ones; because the rules of prohibition of marriage arise out of natural relations; and though these rules (as received by our law) are perhaps carried further than might seem necessary, on mere moral and natural grounds, so far as they can be exactly ascertained by mere reason, yet as they are taken from the law of God and have one common origin therein, they are all considered as of the same moral nature and religious obligation. It is, however to be observed, that even this matter does not appear to have received a final decision at law,(n) although undoubtedly the ecclesiastical court, the proper forum on questions of that nature, conceived that this marriage came within the reach of the prohibition.”(o)

In a subsequent case, although it was unnecessary to decide the point, it was said by Sir John Nicholl, that the marriage of a man with the illegitimate daughter of his deceased wife, is equally incestuous as in the case of a legitimate child.(p)

*Proceedings in the Ecclesiastical Courts for punishing Incestuous Cohabitation.*—Persons within the prohibited degrees living and cohabiting together as man and wife, may be prosecuted in the ecclesiastical court for incest.(q) The points to be established by evidence are the nature of the cohabitation, and the relationship of the parties.(r)

(g) *Osenham v. Gayre*, 30 Car. 2, in C. B. Bac. Abr. Marriage (A.)

(h) Vot. lib. 23, tit. 2, ss. 25, 33.

(i) Inst. Jur. Can. lib. 2, tit. 13; Dig. lib. 23, tit. 3, s. 54.

(k) *Haines v. Jeffcott*, 5 Mod. 168; Comb. 356; Comb. R. 2; 1 Lord Raym. 68.

(l) *Res v. Hodnett*, 1 T. R. 101.

(m) *Regina v. Chafin*, 3 Salk. 66.

(n) *Haines v. Jeffcott*, 5 Mod. 168; 1 Ld. Raym. 68.

(o) *Horner v. Horner*, 1 Hagg. Cons. R. 352, 353.

(p) *Blackmore v. Brider*, 2 Phill. 361.

(q) See stat. 13 Edw. 1, st. 4; 2 Vent. 22.

(r) *Burgess v. Burgess*, 1 Hag. Cons. R. 384.

In cases of incest there are two forms of proceeding, criminal and civil. In the criminal form of proceeding, the office of the judge may be promoted by any one with the permission of the judge himself, the promoter need have no interest; for the object of the suit is to punish and prevent \*the commission of that which the law deems [ \*176 ] the offence; it does not seek to secure or advance the interest of any one; if such effect is produced by the sentence it is purely incidental, and no part of the judicial object of the suit. In *Blackmore v. Brider*,<sup>(s)</sup> the suit was promoted by the churchwardens of the parish against a man who had married the daughter of his deceased wife by a former husband. The churchwardens are to a certain degree the guardians for supporting the moral character and public decency of their parish.<sup>(t)</sup>

In a criminal suit it is not a fatal variance that the defendant in the citation was designated "Harris," and in the articles "Harris" alias "Harry," for in the ecclesiastical courts such variances only are fatal as might lead to some substantial injustice.<sup>(u)</sup>

In a prosecution for incestuous cohabitation, the relationship may be established by circumstantial evidence, without the production of the register of baptism, more especially where it appears that the registers have been carelessly kept. Such a register is only circumstantial evidence, for it contains nothing but the recorded acknowledgment of the parents.<sup>(x)</sup>

In a charge of incest, with a view to substantiate it, the eight first articles pleaded the genealogy of the defendants; supplying in some instances the absence of proper exhibits (owing to the register books of baptism having been lost or mislaid) by acknowledgments, and by general reputation that the parties in the pedigree were respectively related to each other in the manner set forth.<sup>(y)</sup>

As incest is considered highly criminal, and subjects the party to severe punishment, the proof of the charge must be clear and full. In a criminal suit for incest, instituted under circumstances indicative of vindictive feelings, sleeping in the same room in which there were two beds (conduct which the parties proceeded against had been allowed without objection or complaint to continue for thirteen years,) although attended by other facts, inducing a strong presumption of guilt, was held not to be sufficient proof of the offence; and the court \*dismissed the defendants, leaving each party to the payment of their own costs; the court observing, that if the [ \*177 ] suit had been brought by the parish officers, or by some neighbour, apparently from a sense of moral duty, the defendants would probably have been condemned in costs, as a vehement suspicion of guilt was proved.<sup>(z)</sup>

The usual punishment for incest is the performance of public penance on a Sunday, in church, during divine service.<sup>(a)</sup> The parties were also formerly subject to excommunication, which, by stat. 53

(s) 2 Phill. R. 359.

(t) 1 Hagg. Eccl. R. 208.

(u) 1 Hagg. Eccl. R. 196, n.

(x) *Burgess v. Burgess*, 1 Hagg. Cons. R. 384.

(y) *Griffiths v. Reed, and Harry alias*

*Harris*, 1 Hagg. Eccl. R. 196.

(z) *Griffiths v. Reed, and Harry alias Harris*, 1 Hagg. Eccl. R. 195.

(a) Gibs. Cod. 1043; 1 Hagg. Cons. R. 393; *Blackmore v. Brider*, 2 Phill. R. 359.

Geo. 3, c. 127, s. 3, is commuted for "such imprisonment, not exceeding six months, as the court pronouncing or declaring a person excommunicate shall direct."

In a case where it did not appear that there had been a marriage celebrated between the parties, and no such fact was pleaded in the articles, the court enjoined the parties to live separate and apart for the future, but considering the age and infirmity of one of the parties, public penance was not inflicted. The court condemned the man in the full costs of the prosecution, accompanied with the injunction that the same intercourse must not continue, but must be bona fide and substantially removed. That it would not be sufficient for persons who had lived as they had done, to have separate beds in the same house, but in future they must live separate and apart; with an intimation, that if the order were not obeyed, that excommunication and other consequences would necessarily follow.(b)

In a case where a marriage was pleaded in the articles for incestuous cohabitation between a father-in-law and the daughter of the first wife, and the articles prayed the judge to pronounce such marriage null and void; the sentence passed in that form, enjoining also separation and penance.(c)

[ \*178 ] \*In the case of *Ray v. Sherwood*,(d) although it was not a question which the court was called upon to determine, Sir H. Jenner expressed an opinion that parties who had married within the prohibited degrees of *affinity* before the passing of the stat. 5 & 6 Will. 4, c. 54,(e) may be punished by the ecclesiastical court for the incest, though the validity of the marriage cannot be called in question. The learned judge said, "I do not think, where the enacting part of the statute is to the effect 'that all marriages which shall have been celebrated before the passing of this act, between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the ecclesiastical court,' that this amounts to a prohibition to the ecclesiastical court to punish the parties under another branch of the law for incestuous cohabitation. I apprehend the law is not altered in this respect, and that the court is not prohibited by this act from punishing parties for such cohabitation, although it cannot declare the marriage null and void. Again, if we look to the preamble of the act, it is not for the protection of the parties who have been guilty of the offence, for such it is by the ecclesiastical law and by the law of God, but for the protection of the children; for that is the purpose and object of

(b) *Burgess v. Burgess*, 1 Hagg. Cons. R. 393.

(c) *Blackmore v. Brider*, 2 Phill. R. 359; 1 Hagg. C. R. 393, n. In this case the sentence, after declaring the marriage incestuous and unlawful, and void *ab initio*, and admonishing the parties to abstain from all future cohabitation, proceeded: "And we do also pronounce, decree, and declare, that the said William Brider ought, by law, to be canonically punished and corrected for his excess and temerity in the premises, and that he ought to be enjoined and compelled to perform public penance for the same. And

we do enjoin and command him, the said William Brider, to perform such public penance in the parish church of Harting aforesaid, on Sunday, the 19th day of May next ensuing, during the time of divine service, in the forenoon of the same day, and whilst the greater part of the congregation shall be then assembled to see and hear the same;" and the said William Brider was ordered to certify the due performance of the said public penance on or before the 23d day of May, 2 Phill. R. 362.

(d) *Ante*, p. 171; 1 Curteis, 202, 203.

(e) *Ante*, p. 155.

the act to settle the estate and condition of the innocent issue of such marriages, not to screen the delinquent parties.\*

The ecclesiastical court, after the death of either of the parties, may proceed to punish the survivor for incest.

In *Hevis v. Beck*, (f) where a man had married the sister of his deceased wife, and it was suggested that the second wife was dead, and a son, the issue of the second marriage, would be entitled to lands, a prohibition was issued to restrain the ecclesiastical court from proceeding to annul the marriage between the parties after the death of one of them: but it did not prohibit them from punishing the survivor for the incest committed during cohabitation.

\*As to annulling Marriages within the prohibited Degrees.—Marriages before 31st August, 1835, between [ \*179 ] parties within the prohibited degrees of consanguinity are still voidable, notwithstanding the stat. 5 & 6 Will. 4, c. 54, (g) But the ecclesiastical court cannot dissolve such marriages after the death of either of the parties, on the ground that they were incestuous.(h)

Such marriages, if not avoided during the lifetime of both the parties, confer the civil rights of marriage as the right of dower, and of administering the effects of the deceased.:(i)

Either of the parties may bring a suit to have his or her marriage declared null and void, on the ground that they were within the prohibited degrees.(k) The liability of the father to support the issue of his child, under the stat. 43 Eliz. c. 2, (l) was held to give such an interest as would enable him to sustain a suit for ascertaining the validity of the marriage of a child who had attained the age of twenty-one years.(m) A mere stranger cannot institute a civil suit for the purpose, without showing a special interest, which it seems must be of a pecuniary nature.

Thus the sisters, and next of kin of their brother, who had a contingent interest under a will in the event of his dying without lawful issue, were held competent to sustain a suit for setting aside his marriage within the prohibited degrees.(n)

So persons claiming in remainder may bring suits of nullity for declaring a marriage to be void on account of consanguinity.(o)

\*We have already seen (p) that by stat. 5 & 6 Will. 4, [ \*180 ] c. 54, marriages which had before the passing of that act been celebrated between persons within the prohibited degrees of affinity, cannot be annulled, unless in a suit which was depending at the time of the passing of that act (August 31, 1835.)

(f) 3 Salk. 543. See *Brownson v. Edwards*, 2 Ven. sen. 345.

(g) Ante, p. 155.

(h) *Wortley v. Wilkinson*, Holt, 457; *Hinks v. Harris*, 4 Mod. 132; 2 Salk. 543.

(i) *Elliott v. Gurr*, 3 Phill. R. 16. See Co. Litt. 33 a; *Hemming v. Prier*, 12 Mod. 432; *Haydon v. Gould*, 1 Salk. 119.

(k) Si quis contraxerit, et solemnizaverit matrimonium in gradu consanguinitatis, vel affinitatis, de jure Divino prohibito, vel de legibus hujus regni non permisso (quis hujusmodi copulatio non est matrimonium, sed adulterium, seu potius incestus) competit

utriusque partium causa divortii, a vinculo matrimonii, seu potius quia, ab initio, non fuit matrimonium causa nullitatis matrimonii. Oughton, tit. 193, s. 15.

(l) See 1 Bla. Com. 448; 2 Nolan's Poor Laws, 359—376.

(m) *Ray v. Sherwood*, 1 Curteis, 173—235, affirmed by judicial committee of the Privy Council, 6th Dec. 1837.

(n) *Ferrmouth v. Watson*, 1 Phill. R. 335.

(o) *Meynard v. Heselrige*, 1 Addams R. 16.

(p) Ante, p. 156.



In *Ray v. Sherwood*(p) the marriage between the parties took place in the month of June, 1835; on the 24th August in the same year a citation was taken out against both parties in the civil form, and was personally served on both parties on the same 24th of August. The citation called on the parties to appear on the third day after service, if that should be a court-day, if not, on the court-day next ensuing. The 9th September was the first court-day, and then the citation was returned. Proxies for Mr. Ray and his daughter were brought in on that day. On the 9th October a proxy for Mr. Sherwood was exhibited. On the 9th September the libel was brought in, and on the 17th November additional articles.

One question was, what the legislature meant by "a suit depending at the time of the passing of the act." It was contended for Mr. Sherwood that there could be no *lis pendens* without a *litis contestatio*, which clearly had not taken place in this cause on the 31st August, 1835. That the words in question were words of art, and having been used in reference to proceedings in the ecclesiastical courts, the legislature must be supposed to have used them in the sense applied to them by these courts. From various authorities, foreign and domestic, it was contended, that by "suit depending in the ecclesiastical court" was intended *lis pendens*, and that there is no *lis pendens*, and can be none, until there has been a *contestatio litis*; and, as a necessary consequence, that as there had not been any *contestatio litis* in that case, there could have been no *lis pendens*, and, consequently, no suit depending in the ecclesiastical court. Dr. Lushington thought that the rule was "That the *lis pendens* should be considered to commence from the time of taking out the formal proceedings, from whatever court they may originate, and serving notice of these proceedings, [ \*181 ] or attempting to serve it, on the \*defendant, provided the instrument initiating or commencing the process shall, with sufficient clearness and certainty, state the object of the suit; for this appears to be the principle which has governed from the time of Justinian to the present day. Now the citation in this case does clearly show the parties to the suit, the jurisdiction, and the objects sought to be obtained by the suit. He was therefore strongly inclined to come to the conclusion, that parliament has used these words in a general sense, and could discern no adequate reason for imposing a more restrictive meaning. He conceived that the legislature intended that the relief proposed to be given should not be extended to cases, save where persons having an interest had already asserted that interest by the commencement of legal proceedings. He could not conceive any just or adequate cause for a different intention, and for depriving them of their right to prosecute a suit which, in this case, was as much commenced bona fide by the party, by the service of the citation, as if a *litis contestatio* had taken place.(q)

(p) 1 Curteis, 173, ante, p. 171.

(q) 1 Curteis, 183. The learned judge said that he found extreme difficulty in saying that the *lis pendens* entirely depends on there being a *contestatio litis*. In the first place a *litis contestatio* exists only in plenary suits, and it is exceedingly difficult to say what is equivalent to *litis contestatio* in sum-

mary and other proceedings. This point was very much considered in the case of *Byerly v. Windus*, 5 B. & C. 23; 7 D. & R. 596, where Bayley, J. is reported to have said, "According to the usage and course of proceeding in the Court Christian, neither the personal answer nor the plea ever put in issue any of the facts in a libel, they are put

On appeal to the Arches Court of Canterbury, Sir H. Jenner was of opinion, that no technical meaning was intended to be applied by the legislature to the words in question; and secondly, that if those words were to receive an interpretation according to the technical rules of practice of the court, they would not take away the jurisdiction of the court; he therefore entirely agreed in opinion with the judge of the court below on this point, that the jurisdiction of the court was not taken away by the act of parliament, on the \*ground that [ \*182 ] there was no suit depending touching the validity of the marriage at the passing of the act, which was requisite in order to bring it within the terms of the exception of the act, which requires that the sentence of nullity should be pronounced in "a suit depending at the time of the passing of the act."(r)

Suits for nullity of marriage, by reason of incest, are usually promoted at the instance of a party by virtue of the office of the judge, upon the party promovent entering into a bond to pay such costs and charges as the judge or his surrogate should allot in case of failure. A decree in this case is personally served, charging the defendant with being guilty of the foul crime of incest; upon the return of this decree, and an appearance being given, or in event of non-appearance, a further decree, calling upon the defendant to see proceedings, is served, and if no notice be taken the suit proceeds, and articles are exhibited and admitted, pleading the marriage and cohabitation of the father and mother of A. B. and C. D., and annexes the certificate of such marriage, the birth and consanguinity or affinity of A. B. and C. D., when and where they were baptized, annexes a copy of the certificate of such baptism, and further pleads the identity of the parties, the marriage of the defendant with A. B. living and cohabiting as man and wife, and a copy of the certificate of marriage and identity, the death of A. B., and subsequently marrying C. D., the marriage \*certificate, identity of parties, the committing of incest, [ \*183 ] jurisdiction of the court, and prays that the judge do pronounce the marriage null and void, and that the defendant should be corrected.(s)

in issue or admitted by a previous step—a negative or affirmative issue; a negative issue denying what the libel states; an affirmative issue admitting it." Dr. Lushington referred to the case of *Pigott v. Nowor*, 3 Swanst. 535, where Lord Nottingham laid down what he considered to be *lis pendens*, and which was held to be entitled to great weight.

(r) *Ray v. Sherwood*, 1 Curteis, 206—222. The learned judge referred to certain forms in the practice of the court, all of which stated "a cause depending;" notwithstanding that, in an appeal from a grievance on account of the rejection of the libel, there could have been no *contestatio litis*. From certain passages in Oughton, tit. 198, 201, 31, which were cited, it was thought that he considered that there was a *lis pendens* after the issuing of the decree or service of the

citation. The learned judge said, "So it appears with reference to the customary form of the instruments in proceedings in the ecclesiastical courts, and also to the authority of Oughton, that the *contestatio litis* is not necessary to constitute a *lis pendens*; that there may be a suit depending in the ecclesiastical court before *contestatio litis*, and that the *lis pendens*, according to this authority, commences with the extracting and service of the citation; and if not, by analogy with other courts, on the return of the citation, whenever it may be." 1 Curteis, 215—222.

In chancery, a subpoena served is not a sufficient *lis pendens*; unless a bill be filed; but when the bill is filed the *lis pendens* begins from the service of the subpoena. Anon. Vern. 318.

(s) 2 Chitty's Pr. of the Law, 489, 490.

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It is competent to the court to pronounce a sentence annulling a marriage between a man and the sister of his former wife, upon a citation calling upon the parties to answer merely to a suit for incest, although nothing was said therein of annulling the marriage of the parties.(t)

## SECT. 2.—OF MENTAL INCAPACITY.

*Incapacity of Idiots and Lunatics.*—The consent of a free and rational agent being an essential ingredient to the validity of the marriage contract, it necessarily follows that neither lunatics nor idiots are capable of entering into that contract.

The general rule upon this subject is thus stated by Blackstone.(a) "A fourth incapacity is want of reason, without a competent share of which, as no other, so neither can the matrimonial contract be valid. It was formerly adjudged(b) that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination, since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment, though not a cause of divorce, if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void.

This doctrine is fully confirmed by modern authorities. In *Turner v. Myers*,(c) Lord Stowell observed, "A defect of capacity invalidates the contract of marriage as well as any other contract. [ \*184 ] It is true, that there are some obscure dicta in the earlier commentators(d) on the law that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times it has been considered in its proper light, as a civil contract, as well as a religious vow, and like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the Delegates,(e) when the effect of all these dicta was brought before the court; and it has been since acted upon in various cases(f) in this court, which it is unnecessary to review."

Sir J. Nicholl, after quoting the above passage from Blackstone, said, "Here then the law and the good sense of the law are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from

(t) *Chick v. Ramesdale*, 1 Curteis, 34; *Blackmore v. Brider*, 2 Phill. 359; *Cleaver v. Woodridge*, *ibid.* 362 n.

(a) Com. 438, 439.

(b) See Roll's Abr. 357; Shepp. Abr. tit. *Idiot*; 1 Sid. 112; Harg. Co. Litt. 80, a, n. (1).

(c) 1 Hagg. Cons. R. 416, 417.

(d) Sanchez, lib. 1, disp. 8, nom. 15, et seq. is quoted in the report, *An qui ratione destituti sunt ut insani et mente capti possint contrahere sponsalia*, &c.

(e) *Morison v. Stewart*, Deleg. 1745.

(f) *Cloudesley v. Evans*, Prerog. 1763 *Parker v. Parker*, 1757.

idiotcy or lunacy, or from both combined; nor does it seem necessary, in this case, to enter into any disquisition of what is idiotcy, and what is lunacy; complete idiotcy, total fatuity from the birth, rarely occurs; a much more common case is mental weakness and imbecility, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be \*found and marked out [ \*185 ] in the abstract; though it may not be difficult, in most cases to decide upon the result of the circumstances."(g)

*Weakness circumvented by Fraud.*—Considerable weakness of mind, circumvented by proportionate fraud, is sufficient to invalidate the fact of marriage. A marriage de facto, under circumstances of clandestinity inferring fraud and circumvention between a person of weak and deranged mind, and the daughter of his trustee and solicitor, who had great influence over him, and by whom he was clearly considered and treated as of unsound mind, was pronounced null and void, and the pretended wife condemned in costs. This was decided in a suit of nullity of marriage, instituted by the Earl of Portsmouth, acting by his committee, against Mary Ann Hanson, falsely calling herself the Countess of Portsmouth, to have a marriage in fact solemnized between them declared to be null and void in law.

The proceedings originated in the following circumstances:—In January, 1823, a commission issued to inquire into the alleged lunacy of Lord Portsmouth. The inquisition was executed. Very long proceedings took place. The matter was strenuously contested. A great number of witnesses was examined, and the finding of the jury was, "that Lord Portsmouth is of unsound mind, so that he is not sufficient for the government of himself and his property, and has been in the same state of unsound mind from the 1st of January, 1809." In consequence of this finding, a distant relation was appointed committee; and by an order made in the Court of Chancery, the committee was directed to institute proceedings in the ecclesiastical court, "for the purpose of annulling and declaring such marriage void." A long libel was given in, setting forth in detail the mental condition and unsound conduct of Lord Portsmouth, and the measures pursued to effect the marriage; his birth in December, 1767; the death of his father in 1797; the great weakness of his mind from the earliest period; his first marriage in 1799; the settlement on that marriage, and the names of the trustees, Mr. Hanson, the solicitor of the family, being one of these trustees. The libel \*went on to state, [ \*186 ] that, after that marriage, his mental weakness increased, until at length he became of unsound mind; that he so continued and still continues of unsound mind; averring, therefore, that he was

from his birth, and before his first marriage, not of "unsound," but only of "weak" mind, which afterwards became unsound. The libel then proceeded to allege a variety of facts, from that marriage till the death of his first wife, as indicating unsoundness of mind, and proving that he was treated as a person incapable of managing his own property, and was always kept under a certain degree of superintendence and restraint. It further recounted Lord Portsmouth's conduct on the death of his first wife in November, 1813, and the circumstances attending his second marriage on the 7th March following, to show that such marriage was not the act of a person of sound mind, but was effected by fraud and circumvention. It then detailed the subsequent conduct of Lord Portsmouth, and the treatment he experienced in continuation and confirmation of his former unsoundness. It mentioned the birth of a female child at Edinburgh, in July, 1822, his removal from thence just before that event by some of his family, and the subsequent proceedings under the inquisition already mentioned. This being the general substance of the libel, the prayer of it was "that the marriage may be declared null, by reason of the earl being at the time of unsound mind, and incapable of forming such a contract; and also by reason of the fraud and circumvention practised on him upon that occasion, and that Mary Ann Hanson may be condemned in the costs of suit." It consisted of forty-nine articles, and on it forty-seven witnesses were examined. On the part of Lady Portsmouth an allegation in reply was given in, setting forth that Lord Portsmouth was possessed of a capacity and understanding fully equal to the ordinary transactions of life; was so considered and treated by all persons, till removed from Edinburgh on the 2d July, 1822; corresponded with his friends, mixed in society like other noblemen and gentlemen; in 1790, on coming of age, suffered recoveries with his father, and made a new settlement of his family property. It explained the arrangements on his first marriage, and detailed his observations upon it. It alleged \*that he settled accounts with his agents, attended [ \*187 ] public meetings and committees, prosecuted an offender, and was examined as a witness, in 1802; was much affected at the death of his wife; that the second marriage was freely entered into, was his own act, and the result of no fraud; that his family wrote letters of congratulation on that marriage; that in 1814, his brother applied for a commission of lunacy, which was refused; that, subsequently, in 1815, Lord Portsmouth executed a will and codicil, exercised his functions as a peer, and cohabited with Lady Portsmouth till removed by force from Edinburgh; and it exhibited many of his letters. This allegation consisted of above thirty articles, and fifty-seven witnesses were examined in support of it. Sir J. Nicholl observed, in giving judgment, "The law of the case admits of no controversy, and none has been attempted to be raised upon it. When a fact of marriage has been regularly solemnized, the presumption is in its favour; but then it must be solemnized between parties competent to contract, capable of entering into that most important engagement, the very essence of which is consent, and without soundness of mind there can be no legal consent, none binding in law; insanity vitiates all acts. Nor am I prepared to doubt but that considerable *weakness of mind*, circumvented by proportionate fraud, will vitiate

the fact of marriage, whether the fraud is practised on his ward, by a party who stands in the relation of guardian, as in the case of *Harford v. Morris*,<sup>(h)</sup> which was decided principally on the ground of fraud; or, whether it is effected by a trustee, procuring the solemnization of the marriage of his own daughter, with a person of very weak mind, over whom he has acquired a great ascendancy. A person incapable from weakness of detecting the fraud, and of resisting the ascendancy practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act. At all events, the circumstances preceding and attending the marriage itself, may materially tend to show the contracting party was of unsound mind, and was so considered and treated by the parties engaged in fraudulently effecting the marriage. In respect to Lord Portsmouth's unsoundness of mind, the case set up is of [ \*188 ] a mixed nature, not absolute idiocy, but weakness of understanding—not continued insanity, but delusions and irrationality on particular subjects. Absolute idiocy, or constant insanity, would have carried with them their own security and protection; for, in either case, the forms preceding, and the ceremony itself, could not have been gone through with without exposure and detection; but here a mixture of both, by no means uncommon, is set up—considerable natural weakness, growing at length, from being left to itself and uncontrolled, into practices so irrational and unnatural, as, in some instances, to be bordering upon idiocy, and in others to be attended with actual delusion—a perversion of mind—a deranged imagination, a fancy and belief of the existence of things which no rational being, no person possessed of the powers of reason and judgment, could possibly believe to exist. It appeared, that in February, 1814, Lord Portsmouth was brought to London by his medical attendant, and delivered up to his trustees, Hanson being one, and then in town; that day week he was married to one of his daughters! It is unnecessary to state the jealousy with which the law looks at all transactions between parties standing in these relations to each other.

“The whole transaction will bear but one interpretation; every part of it is the act of the Hansons! Lord Portsmouth is a mere instrument in their hands to go through the necessary forms; the settlement is begun in forty-eight hours after Lord Portsmouth's arrival in London! The contents of that settlement, the mode in which it is prepared, the concealment of the whole from the friends and the other trustees, who were in town, some in the same house with Lord Portsmouth, all these particulars bear the same character. The necessary forms are gone through; but in support of these mere forms, not a witness is produced to show that this nobleman was conducting himself as a man understanding what he was doing, or capable of judging or acting as a free and intelligent agent; nothing tending to show that he was a person of sound mind—nothing in his conduct inconsistent with unsoundness of mind; every circumstance conspires to prove that he was the mere puppet of the Hanson family, and that the cele-

(h) 2 Hagg. Cons. R. 423; ante, p. 134—136.

[ \*189 ] bration \*of this marriage was brought about by a conspiracy among them to circumvent Lord Portsmouth, over whom they, and particularly the father, had a complete ascendancy and control, so as to destroy all free agency and rational consent on his lordship's part to this marriage. A marriage so had, wants the essential ingredient to render the contract valid, the consent of a free and rational agent. The marriage itself, and the circumstances immediately connected with it, do not tend to establish restored insanity; it was neither a rational act, nor was it rationally done—the whole sounds to folly, and negatives sanity of mind. The Hansons, in the mode of planning and conducting the transaction, show that they treated and considered Lord Portsmouth as a person of unsound mind; and he in submitting, acquiescing, and not resisting, confirms his own incompetency. Even if no actual unsoundness of mind, strictly so called—if no insane derangement had existed—if only weakness of mind, and all admit he was weak—yet considering the passiveness and timidity of his character on the one hand, the influence and relation of Hanson, his trustee, on the other, and the clandestinity and other marks of fraud which accompanied the whole transaction, I am by no means prepared to say, that without actual derangement in the strict sense, the marriage would not be invalid, but, in my judgment, Lord Portsmouth was of unsound mind, as well as circumvented by fraud." Upon the whole, the court pronounced the marriage in fact solemnized between the Earl of Portsmouth and Miss Hanson to be in law null and void, he being at that time not of sound mind sufficient to enter into such a contract; and that the celebration of such marriage was effected by fraud and circumvention: and on the latter ground, the court granted the prayer for costs.(i)

The court decreed against the marriage of a young man in the middle of life with an old woman of 70, an habitual drunkard, and labouring under great infirmities, but possessed of considerable property, which was to be acquired by the marriage, without the knowledge of any of her friends, or any settlement whatever. The general nature of the case appeared \*to be, that the woman was [ \*190 ] always from her youth a silly or foolish person, possessing a very weak understanding, which nearly approached to idiotcy, and was considered to be and treated as such; that as she grew older her mental faculties more rapidly decreased, insomuch that for several years she was wholly incapable of governing or taking care of herself or her affairs; and that, by reason of her weak and decayed state of mind, she was incapable of understanding the nature of courtship and addresses, or of consenting and agreeing to be married.(k)

A man who had a weak understanding from infancy, and whose mind was occasionally disordered by drinking, married with previous deliberation and intention, and purchased and paid for the license and was married by the curate, who swore that he went through the ceremony with as much propriety as any man could do. In the absence of evidence of mad acts about the time of the marriage, the court

(i) *The Countess of Portsmouth v. The Earl of Portsmouth*, 1 Hagg. Eccl. Rep. 355 —374.

(k) *Browning v. Reane*, 2 Phill. R. 69.

was of opinion that he had sufficient capacity to contract a legal marriage.(l)

*Deaf and Dumb Persons.*—A person born deaf and dumb is not on that account, incapable of marrying, but may, if compos mentis, contract matrimony by signs.(m)

*Marriage not affected by subsequent Insanity.*—The subsequent insanity of a person who was of sound mind at the time of the marriage, does not avoid it,(n) nor release the parties from the duties of their marriage vow.(o)

*Statute for preventing Marriages of Lunatics.*—The marriage of a lunatic, during a lucid interval, had formerly the same validity as his other acts; but the difficulty of proving the exact state of the party's mind at the actual celebration of the nuptials (concurring with some private family reasons) has induced the legislature to make the existence of a commission of lunacy against a party, an effectual bar to his contracting a marriage even during a lucid interval.

\*By stat. 15 Geo. 2, c. 50,(p) it is enacted, "that from [ \*191 ] and after the 24th day of June, 1742, in case any person who now is, or at any time hereafter shall be found a lunatic by any inquisition taken, or to be taken, by virtue of a commission under the great seal of Great Britain; or any lunatic or person under a phrenzy, whose person and estate by virtue of any act of parliament now are or hereafter shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the lord high chancellor of Great Britain, the lord keeper or lords commissioners of the great seal of Great Britain for the time being, or such trustees as aforesaid, or the major part of them respectively, every such marriage shall be and is hereby declared to be null and void to all intents and purposes whatsoever." A similar statute has been passed with respect to Ireland.(q)

A marriage within this act is void without any sentence of the ecclesiastical court.

In 1804, a commission of lunacy issued, under which T. was found to be a lunatic, and a committee of his person was appointed, but no further proceedings were had under the commission until 1812. In

(l) *Parker v. Parker*, 2 Lee, 382.

(m) Swinburne on Marriage, sect. 16; Sanchez, lib. 1, disp. 8, No. 12—14. See *Elliott's case*, Carter, 53; *Dickenson v. Blissett*, 1 Dick. 268.

(n) Furor impedit matrimonium contrahendum, sed non dirimit contractum.—Inst. Juris. Canon. lib. 2, tit. 12; Corvinus Jus. Canon. lib. 2, tit. 13, de Nuptiis.

(o) *Parnell v. Parnell*, 2 Hagg. Cons. R. 169.

(p) This act is sometimes called the Bradford Act, as said to have been introduced by Mr. Pulteney to prevent Lord Bradford, to whom he was next in remainder, from marrying. 1 Browne's Civil Law, 8 n.; Com. Dig. tit. Idiot. (D 1.)

(q) By 51 Geo. 3, c. 37, it is enacted, "that from and after the expiration of ten days after the passing of this act (31 May,

1811) in case any person who has been, or at any time hereafter shall be found a lunatic, by any inquisition taken or to be taken by virtue of a commission under the great seal of Great Britain, or the great seal of Ireland respectively, or any lunatic or person under a phrenzy, whose person and estate, by virtue of any act of parliament, now or hereafter shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane mind by the lord high chancellor of Great Britain or Ireland, or the lord keeper or lords commissioners of the great seal of Great Britain or Ireland for the time being, or such trustees as aforesaid, or the major part of them respectively, as the nature of the case shall require, every such marriage shall be and is hereby declared to be null and void to all intents and purposes whatsoever."



that year, the lunatic being at large, was, by virtue of a license procured for that purpose by his servant, married to a mantua-maker, in whose house he then resided. On a petition presented by the committee, principally for the purpose of taking the opinion of the court [ \*192 ] \*whether any proceedings should be taken in the ecclesiastical court to have the marriage declared void, it was contended, that the marriage under the above act being *ipso facto* void, such proceedings were unnecessary. Lord Eldon said, that under the royal marriage act(r) declaring certain marriages void, it had been thought necessary to have a sentence of the ecclesiastical court, but he did not know on what ground that opinion proceeded. It was referred to the master to see what proceedings ought to be taken: the master reported his opinion to be, "that the marriage was void by the operation of the statute alone; and that no proceedings were necessary to be had in the ecclesiastical court to have the same declared to be so." Such report was confirmed by Lord Eldon, on the ground that such an application was unnecessary, as the marriage was declared void by the act of parliament.(s)

Where a party has been found of unsound mind under a commission of lunacy taken out previously to the marriage, the conclusion against it will be founded on the stat. 15 Geo. 2, c. 30;(t) where there has been no such commission the mental incapacity of the party must be established in evidence. And in such cases the court will require it to be shown by strong evidence, that the marriage was clearly had during a lucid interval, if it be first found that the person was generally insane.(u)

*Interference of Court of Chancery as to Lunatics' Marriages.*—In cases where parties have been found to be insane, under a commission of lunacy, from a period antecedent to their marriage, it is the usual practice for the lord chancellor, on the petition of the committees of lunatics, to direct references to the master to inquire as to the propriety of instituting proceedings in the ecclesiastical court for setting aside such marriages; and on the master reporting in favour of such proceedings, to direct them to be taken accordingly.(x)

It may be prudent, although it is not necessary, for the committees [ \*193 ] to obtain the sanction of the lord chancellor for \*instituting proceedings in the ecclesiastical court. The committee as the guardian of the lunatic, may proceed to dissolve his marriage, on account of his incapacity, or institute a suit against the wife of the lunatic for adultery.(y)

In cases where no commission has issued, and the sanity at the time of the marriage of a party to a suit in chancery is a point which calls for a determination, that court will direct an issue to try the sanity of the party at the time of marriage. This was done in the case of a ward of that court who had been married with her father's consent during a lucid interval, but whose sanity appeared doubtful.(z)

To marry a non compos, the custody of whose person had been

(r) 12 Geo. 3, c. 11, ante, pp. 39, 40.

(s) *Ex parte Turing*, 1 Ves. & B. 140.

(t) 2 Phill. R. 90.

(u) *Turner v. Meyers*, 1 Hagg. Cons. R.

417. See *Sanchez*, lib. 1, disp. 8, No. 16—

18.

(x) See Shelford on Lunatics, 449.

(y) *Parnell v. Parnell*, 2 Phill. R. 158.

(z) 1 Dow P. C. 178; see *Ex parte Ferme*,

5 Ves. 832.

granted to committees, is a contempt. The party contriving to effect a marriage with a lunatic without making any settlement, and others concerned in procuring the marriage were committed to the Fleet; and it was ordered at the same time, that all deeds and securities relating to the lunatic's fortune should be lodged with the master, in order to secure a provision for the wife, in case she survived her husband.(a)

In *Smart v. Taylor*,(b) the court of chancery ordered an information to be filed by the attorney general against the principal contriver of the marriage of an idiot, who had lands of inheritance; and two women who were accessory to the marriage were committed until they gave evidence against him or found security for the purpose.

*Nature and evidence of Insanity.*—“Madness (observed Lord Stowell) is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelope the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we [ \*194 ] can \*know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held by the common judgment of mankind to affect his general fitness to be trusted with the management of himself and his own concerns.”(c)

Absolute insanity speaks for itself; in milder cases the absence or presence of delusion forms a very important test or criterion as to the mental state of the party. Insane delusion consists in the belief of facts, which no rational person would have believed. An opinion against rational probability is not necessarily an insane opinion; it is not drawing right conclusions from manifestly false premises, but erroneous inferences from premises which may be true. The delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances, such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms, which may tend to confirm the existence of delusion, and establish its insane character. Wherever the patient conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever at the same time, having once so conceived, he is incapable of being, or at least of being *permanently* reasoned out of that conception, such a patient is said to be under a delusion.(d)

In a case where the testamentary capacity of a party was in question, Sir J. Nicholl said, “It may be difficult and perhaps would be dangerous to attempt to define what is the essence of insanity. De-

(a) *Packer v. Wyndham*, Proc. Ch. 203. 412.

(b) 9 Mod. 98.

(c) 1 Hagg. Con. R. 417, 418.

(d) See Sir J. Nicholl's remarks in *Drew v. Clerk*, 3 Addams R. 90, 91, 180, 181. C. reported by Hagg. 27; *Fulleck v. Allen*, 3 Hagg. Eccl. R. 545.

lusion has been generally laid down as essential; that is, the fancying things to exist which can have no existence, and which fancy no proof or reasoning will remove. Others may have said, that insanity may exist though no delusion prevail; whether this means that it may exist where no delusion ever has prevailed, or only where you [ \*195 ] \*cannot call it forth upon the particular occasion, is not so clear. No case has ever come under my notice where insanity has been held to be established without any delusion ever having prevailed, nor am I able exactly to understand what is meant by a "lucid interval," if it does not take place when no symptom of delusion can be called forth at the time. How but by the manifestation of the delusion, is the insanity proved to exist at any one time? The disorder may not be permanently and altogether eradicated, it may only intermit, it may be liable to return; but if the mind is apparently rational upon all subjects, and no symptom of delusion can be called forth on any subject, the disorder is for that time absent; there is then an interval, if there be any such a thing as a lucid interval. It may often be difficult to prove a lucid interval, because it is difficult to ascertain the total absence of all delusion.

Where clear, decided, and undoubted insanity has been established to have once existed before the contested transaction, acts, otherwise of a doubtful character, may become of more force in proof of its existence, at the time in question. Even acts decidedly of an insane character, occurring after the transaction, may reflect back upon acts, otherwise equivocal, about the time of the transaction itself, or on the general deportment of the party; but where there are no decided acts proved ever to have taken place, when all the acts are equivocal; when they may be attributed to other causes, to violent passion, to intoxication operating upon a mind naturally excitable, I am not aware that in any case such equivocal acts, however numerous, have been held to establish insanity."(e)

The following general rules laid down upon this subject by Lord Thurlow may be very useful in their application to particular cases: There is an infinite, nay, almost an insurmountable difficulty in laying down abstract propositions upon a subject, which depends upon such a variety of circumstances as the legal competency of the mind, to the act in which it is engaged, if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility sufficiently strong to lead to a suspicion [ \*196 ] of intellectual \*incapacity. General rules are easily framed, but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance which may enter into and materially affect the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it be true that a mind, in such possession of itself ought, when acting, to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried. The course of procedure for the purpose

(e) *Wheeler and Batesford v. Alderman*, 3 Hag. Eccl. R. 536—689.

of trying the state of any party's mind allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement. The evidence in such a case applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind, which is deemed necessary, in general, to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party, who had confessedly laboured under a mental derangement, was capable of doing acts binding on himself and others.(f)

The marriage of a lunatic, not under a commission of lunacy, \*during a lucid interval is valid. And there is [ \*197 ] authority for the proposition that a marriage by a non compos, when of unsound mind, is rendered valid by consummation during a lucid interval.(g)

It may be questioned what degree of evidence will satisfy the court that the marriage was the act of an insane moment, when no commission of lunacy can be obtained, and the party not being alleged to be insane, must be presumed to be in his right senses..

In cases of the most inveterate malady, there are lucid intervals on which legal acts may be founded. The case of *Cartwright v. Cartwright*,(h) was a strong case of this kind, in which the will made during a lucid interval was established. In that case the sanity of the moment was, in a great measure, inferred from the internal character of the wisdom of the act itself. No such character of wisdom can be attributed to the act of a man connecting himself, in marriage, with a common prostitute, without any rational prospect of happiness. But it will not be conclusive certainly, against the sanity of the act, that it was an unwise act. The man in the best exercise of his reason, might not be a wise man; and the question in such a case is as to the sanity of the act, not the wisdom of the party. Lord Stowell was of opinion, that no evidence would be sufficient to induce the court to pronounce against the sanity of an act, to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved.(i)

Insanity must be proved; it being a clear rule of law that sanity is

(f) *Attorney General v. Parmler*, 3 Br. C. C. 443, 444.

(h) 1 Phill. R. 90.

(g) *Ash's case*, Pr. Ch. 703; *Freem. C.* 416. C. 259.

(i) *Turner v. Meyers*, 1 Hagg. Cons. R.

presumed until insanity is proved; and the burthen of the proof lies on the party asserting its existence.(k)

In proof of insanity, particular acts of madness, and not general evidence that the party is insane, should be brought forward.(l)

It was decided, that the commission of suicide by the husband, [ \*198 ] immediately after marriage, was not such evidence of \*insanity as would render the marriage void. Lord Eldon admitted, that it was fair to consider whether, at the time of the contract, the party did not intend to commit the act of suicide; and proof that he was, at the time of the marriage, under the influence of that morbid feeling, would be a circumstance of considerable weight in leading to the inference of insanity.(m)

It is a rule of law that in civil suits it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic during the period of the lunacy, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself.(n)

The conduct of the party always affords forcible evidence in questions as to capacity, as the management of affairs throughout life; but mental capacity is negatived by showing that the party was in a state of pupillage, though not in actual confinement, and never did any act of business, or entered into a contract of any sort; and that he was supported with common necessities, not by the allowance of money, but by being placed under the care of other persons.(o)

The character of being easily intimidated and controlled usually marks and accompanies unsoundness of mind, whether it be imbecility or derangement, or a mixture of both.(p)

It seems that evidence to show hereditary insanity in the blood, is not admissible in an issue as to the insanity of a party.(q)

On a question as to the sanity of a party at the time of the execution of a deed, the witnesses cannot be asked whether the sister of the party be not insane.(r)

The verdict of a jury, under a commission of lunacy, will not of itself affect the validity of a marriage *de facto* solemnized, though solemnized within the time of the finding by the jury. The finding is [ \*199 ] a circumstance and a part of the evidence \*in support of the unsoundness of mind at the time of the marriage, but no more, for the ecclesiastical court must be satisfied by evidence of its own, that grounds of nullity existed.(s)

In a case where the validity of a marriage was disputed after the death of the party; on the ground of insanity, and a writ *de lunatico inquirendo* had been executed six months after the marriage, and the verdict of a most respectable jury, before whom the party had been

(k) Hale's P. C. 33; 3 Hagg. Eccl. R. 598.

(l) 2 Atk. 340.

(m) *M'Adam v. Walker*, 1 Dow P. C. 180; see *Burrows v. Burrows*, 1 Hagg. Eccl. R. 109.

(n) *Groom v. Thomas*, 2 Hagg. Eccl. R. 436.

(o) *Browning v. Reane*, 2 Phill. R. 86.

(p) Per Sir J. Nicholl, 1 Hagg. Eccl. R. 370.

(q) *M'Adam v. Walker*, 1 Dow P. C. 148.

(r) *Doe d. Mather v. Whitefoot*, 8 Carr. & P. 570.

(s) *Countess of Portsmouth v. Earl of Portsmouth*, 1 Hagg. Eccl. R. 356.

produced and examined in person, had found him incapable for two years antecedent to the marriage; and no attempt had been made to impeach such verdict in chancery; the inquisition so taken was held strong confirmation of the other evidence of insanity.(t)

*Mental incapacity produced by Intoxication.*—Intoxication is, in truth, temporary insanity, the brain is incapable of performing its proper functions; there is temporary mania—but that species of derangement, when the exciting cause is removed, ceases; sobriety brings with it a return of reason.(u)

Mental incapacity produced by intoxication will, it seems, have the same effect as insanity. An irregular marriage in Scotland was set aside, where it was proved that the woman was in such a state of intoxication as to be incapable of giving a valid consent.(x)

It may be inferred from the following passage in a judgment of Lord Stowell's, that the same rule would prevail here. "I will not lay it down, that in no possible case can a marriage be set aside, on the ground of having been effected by a conspiracy. Suppose three or four persons were to combine to effect such a purpose by intoxicating another, and marrying him in that perverted state of mind, this court would not hesitate to annul a marriage on clear proof of such a cause, connected with such an effect. Not many other cases occur to me, in which the co-operation of other persons to produce a marriage can be so considered, if the party was not in a [ \*200 ] state of disability, natural or artificial, which created a want of reason or volition amounting to an incapacity to consent."(y)

Where the party has been found a lunatic under a commission of lunacy, and committees have been appointed, such committees are the proper persons to institute a suit touching the validity of the lunatic's marriage.(z) The wife, however, in a suit of nullity is entitled to alimony pending the suit, and the ecclesiastical court will not proceed until the committee has supplied funds to the wife for conducting her defence.(a)

A lunatic, during the existence of his malady, cannot personally institute a suit in the ecclesiastical court;(b) but a party who was insane at the time of contracting a marriage, may himself on recovering his senses come forward to institute and maintain a suit for setting aside his marriage, on the ground of his own mental incapacity at the time. In such a case the degree of proof must be stronger than ordinary.(c)

In a suit instituted by the father to annul the marriage of his son, on the ground of insanity, it was objected, on the part of the wife, that the father had no right to bring such a suit, the son being, at the time of marriage of age, and *sui juris*, unless appointed committee of his person. The court having taken time to deliberate, observed—

(t) *Browning v. Reane*, 2 Phill. R. 69.  
(u) See 1 Fonbl. Eq. p. 67, 5th ed.; 3 Hagg. Eccl. R. 602.  
(x) *Johnston v. Brown*, 2 Shaw & Dunl. 495.  
(y) *Sullivan v. Sullivan*, 2 Hagg. Cons. Rep. 246.

(z) Ante, p. 192.  
(a) *Countess of Portsmouth v. Earl of Portsmouth*, 3 Addams's R. 63.  
(b) *Parnell v. Parnell*, 2 Hagg. Cons. R. 163.  
(c) *Turner v. Meyers*, 1 Hagg. Cons. Rep. 414—418.

That the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time; the fact being pleadable, the only question is, whether the person before the court is the proper person to plead it. It is not alleged that the son is now insane; and though under the care of his father, that may be only for weakness, as it is allowed a commission of lunacy cannot be obtained. He is then to be presumed sane, and, as such, capable of bringing suits, *proprio jure*:—no man can be plaintiff for him, he must complain; no man can be defendant for him, he must defend himself; no one can [ \*201 ] be \*attorney or procurator for him, but by his own appointment.(d)

But it seems that the legal obligation imposed by the statute 43 Eliz. c. 2, on the grandfather to maintain his grandchildren in the event of their becoming poor, lame, or impotent, is such an interest as will enable a father to sustain a suit for setting aside the marriage of his children on the ground of their insanity at the time of the marriage.(e)

The marriage of a lunatic being absolutely void, and not merely voidable, the validity of his marriage may be questioned and declared void after his death in a suit as to the right to administer. Thus administration of the effects of a wife was refused to the husband, on the ground that his marriage had been illegally contracted with a person of unsound mind.(f)

### SECT. 3.—OF IMPOTENCE.

*Impotence a ground for Nullity of Marriage.*—Marriage having been ordained for the procreation of children, a capacity of consummation is implied in the marriage contract; and is so far one of the essential duties for which the parties stipulate, that the incapacity of either party to satisfy that duty affords a ground for nullifying the contract.(g)

This impediment to lawful marriage is known by the general term *impotence*, which may arise from malconformation, or frigidity of [ \*202 ] constitution, or from any other physical defect \*in the organs of generation. Impotence then consists in the incapacity for copulation, or in the impossibility of accomplishing the

(d) *Turner v. Meyers*, 1 Hagg. Cons. R. 414, 415, n.

(e) *Ray v. Sherwood*, 1 Curteis, 173—235. Affirmed by judicial committee of privy council, 6th Dec. 1837. Ante, p. 179.

(f) *Browning v. Reane*, 2 Ph. R. 69. See *Parker v. Parker*, 2 Lee, 382.

(g) 2 Hagg. Cons. R. 62; Co. Litt. 236, a; 1 And. 185; 5 Rep. 98, b; 2 Leo. 170. Quia matrimonium ordinatum fuit, non solum ad evitandam fornicationem, sed etiam ad proles procreandas; si matrimonium (tale quale) fuerit, inter virum et mulierem, de facto, solemnizatum, qui omnino inhabiles

sunt non propter etatem, sed propter aliquod naturale impedimentum ad proles suscitandas (utpote, propter impotentiam, frigiditatem, maleficientiam, et similia, quæ, ipso jure, reddunt hujusmodi matrimonium nullum.) Hæc impedimenta naturalia aliquando contingant, tam in muliere, quam in viro, et pars gravata agere potest, in causâ nullitatis matrimonii. Oughton, tit. 193, s. 17.

“Aptitudo quidem ad generandum, essentialis matrimonii requisitum est, concubitus ipse non ad perfectionem sed ad implementum pertinet.” Huberus de Nuptiis, lib. 1, tit. 10, s. 1.

act of procreation. The manifest causes of impotence in both sexes are divided into physical and moral. The causes of impotence in man arise from two sources, from malformation of the genitals or from want of action in them; but in females impotence can only depend on malformation, either natural or acquired.(k)

It does not however, come within the design of this work to enter into an examination of this very delicate subject; ample information may be found upon it in other writers.(i)

*Duty of the court in suits for Impotence.*—Cases of impotence and malconformation are necessarily attended with serious mischiefs to parties, in the disappointment of very laudable or allowable purposes of marriage, the desire of having children, and the lawful enjoyment of each other's person. Such cases of disappointment, so originating, may not be frequent; but when any such occurs, it is a subject, which the court is bound to entertain, and to treat according to the ordinary modes of investigating the truth of the complaint, for the relief of the injured party.(k)

Courts of justice are not invested with the privilege of selecting cases on the grounds of personal feelings of delicacy, but are bound to exercise the jurisdiction which has been given them by law, and are not at liberty to decline it, merely because the cases are offensive to private delicacy. Therefore cases of impotency, though of an unpleaaant nature to entertain for the purpose of judicial examination, must be dealt with when brought under judicial cognizance.(l)

The court will be cautious against collusion between the parties where it can reasonably be suspected, but it will not be presumed without some ground.(m)

*\*Cohabitation previous to Commencement of Suit.*—A [ \*203 ] three years' cohabitation is required by law before a suit can be entertained for annulling a marriage by reason of impotence, unless it appear from evidence that the party is so absolutely and naturally incapable of performing the act of generation,(n) that the infirmity can be ascertained at once, as in the case of malconformation.(o)

A triennial cohabitation is so requisite, that if the parties have been-married three years, but a great part of that time have been absent from each other, the man will be allowed the further time during which he had been absent.(p) Inspection was refused until after a triennial cohabitation.(q)

*Either Party may be Complainant.*—The rights and duties of both parties being coequal, either party may promote a suit for

(k) See Dr. Ryan's Philosophy of Marriage, 300—308.

(i) See works on Medical Jurisprudence, 1 Chitty, 370—382; Beck, 5th ed. 1836, pp. 49—68; 1 Paris & Fonbl. 168. 197—215; Bayle's Dict. tit. Quellenec.

(k) *Briggs v. Morgan*, 2 Hagg. Cons. R. 329.

(l) *Harris v. Ball*, Deleg. 16 July, 1789, cited 2 Hagg. Cons. R. 327; *Briggs v. Morgan*, 2 Hagg. Cons. R. 326.

(m) *Pollard v. Wybourn*, 1 Hagg. Eccl. R. 726. See 2 Hagg. Cons. R. 332; 2 Phill. R. 10.

(n) Ayliffe's Parer. p. 228.—“Hæc triennialis expectatio non est necessaria, ubi statim possit constare de impotentia coeundi.”—Oughton, tit. 217, n. b.

(o) *Briggs v. Morgan*, 3 Ph. R. 329.

(p) *Welde v. Welde*, 2 Lec. 590.

(q) *Aleson v. Aleson*, 2 Lec. 516.



obtaining a sentence of nullity, but there must be such evidence as will satisfy the court that *at the time the marriage took place* there existed an impediment to consummation, and that it is incurable.<sup>(r)</sup> In 1807 the marriage took place; in 1809 the wife instituted a suit to annul such marriage, on the ground of the impotency of her husband. A libel was given in alleging his incapacity to consummate the marriage; and the husband admitted this fact in his answers. There was evidence also, the report of two physicians and two surgeons, who had been duly appointed and sworn to inspect the person of the husband; which stated in substance, that though the disease and imperfection of the parts was not such as to imply impotency in the execution of their functions, yet that having heard his own accurate history of his alleged impotence, they put faith in his account; and as he was in good health, they could hold out no hopes of his impotence being remedied by any medical treatment. Lord Stowell said, "I think there is enough to satisfy the court, that at the time when this marriage took place, there was incom-  
[ \*204 ] petency, on the part of the man, to perform the \*duties of marriage; a capacity to perform which is necessary to render it valid. The court is, upon the whole, satisfied of the existence of this fact, and that there has been no collusion between the parties. There is an air of truth and sincerity in the evidence; and the party appears willing to compensate, as far as is in his power, the injury which he states he has ignorantly done."

The court pronounced the sentence of nullity.<sup>(s)</sup>

It seems that where the defect is natural, that the presumption is, that it existed before the marriage, but a contrary presumption arises where the defect is only accidental.<sup>(t)</sup>

Suits of this kind brought by the husband against the wife, have been of rare occurrence; the suit has generally been brought by the wife; it is said that two instances only were established by proof in sixty years. Malformation is not common in either sex, and probably more uncommon in the female. Where such defects exist, parties will often be discreet enough to abstain from marriage entirely; or where a marriage has been contracted in ignorance of the defect, there may be many reasons, some good and some perhaps occasionally bad, which will prevent the parties from making an application to the court, or any other public disclosure. In point of effect upon the state of domestic life, it cannot be maintained that the injury is not as great on the side of a husband as of a wife, and that there is not the same ground of complaint to the fullest extent.<sup>(u)</sup>

The nature of the proofs required in cases of this kind is thus stated in Oughton.<sup>(x)</sup>

<sup>(r)</sup> *Brown v. Brown*, 1 Hagg. Eccl. R. 523.

<sup>(s)</sup> *Greenstreet*, falsely called *Cumyngs v. Cumyngs*, 2 Phill. R. 10; 2 Hagg. Cons. R. 332.

<sup>(t)</sup> Sanchez, lib. 7; Disp. 103, n. 4; Godol. Rep. Canon. 494.

<sup>(u)</sup> *Briggs v. Morgan*, 2 Hagg. Cons. R. 326; 3 Phill. R. 327.

<sup>(x)</sup> "Ad probandum defectus iudex petitionem partis allegantis impedimenta (si talia sint, quæ ex corporis inspectione judicari possunt) compellere potest virum ad exhibendum presentiam suam et ad ostendendum (in loco aliquo secreto, per iudicem assignando) pudenda sua, seu illos corporis defectus quos mulier objicit (si ex inspectione corporis apparere possint) medicis et chirurgis peritis,

\*In one case the marriage took place in April, 1815, [ \*205 ] the man being of the age of forty-one, the woman seventeen. The parties had cohabited together, at intervals, as man and wife till the spring of 1823, when, under medical advice, they ceased to occupy the same bed, in consequence of her health having suffered; but they lived under the same roof until 1826. A medical certificate fully proved that the marriage had never been consummated, and that the woman, though *virga intacta*, was *apta viro*, Dr. Lushington thought that there were the very strongest reasons to presume the impotency of the man. If the parties lay together in one bed for so many years, of such ages, and the woman is certified to remain *virga intacta*, there cannot be a stronger presumption that impotency existed, and that it was incurable. Such a lapse of time satisfies the court that in all human probability the husband was incapable of consummating the de facto marriage; but the case did not depend upon inference \*from these facts only, for [ \*206 ] the impotence of the man was strongly confirmed by two acknowledgments to surgeons long before the institution of the suit. The sentence of nullity was decreed.(y)

It is said that the competency of the woman ought to be tried by the careful inspection of grave and honest matrons of her parish, and to be well attested by them on oath, viz. that she can never be a mother or proper wife, because she is *nimis arcta* and unfit for generation.(z)

*Medical Certificate.*—It seems that the report of medical men, who have inspected the man, is not alone sufficient evidence of

prius judicialiter, in presentia partis adversæ, de diligenter inspiciendo virum et de referendo in scriptis eorum iudicium, juratis. Et si medicorum et chirurgorum iudicium sit, et quod morbus vel defectus viri fuerit insanabilis et incurabilis (tamen tenentur, in relatione eorum iudicii, ipsum morbum seu defectum specificare, ne circumveniantur ecclesiæ,) et quod (in eorum scientiâ doctrinâ et experientiâ) morbus aut defectus huiusmodi nullâ re aut arte medicâ curari possit, mulier obtinebit in causâ.

“Hoc addito et allegato, ex parte mulieris, quod ipsa sit juvenis et ad procreationem apta, et quod, per tres annos insimul pernoctarunt et quod quamvis a marito cognosci cupiebat ab eo tamen cognita non fuit, nec cognosci potuit. Et si defectus, prædicto viro (ut præfertur) objecti, non possunt directe, per medicos et chirurgos juratos, judicari, aut decerni; vel forsân dubia sit eorum relatio, allegatur (ex parte mulieris) non solum, quæ ultimò recitata sunt, sed etiam, hoc addito; quod sit virgo intacta, nec a quoquam cognita. Et ad hoc probandum, judicialiter (precedente petitione, ex parte mulieris) iurandæ sunt obstetrices et mulieres vetulæ, et in his casibus expertæ, et peritissimæ, ad inspiciendam mulierem, an vera sint hæc allegata.

“(Hic nota; quod si defectus objiciantur

contra mulierem, probandi sunt, isto modo, per inspectionem, et relationem, harum mulierum juratarum.) Et si iudicio huiusmodi obstetricum et mulierum reperta fuerit virgo, saltem fœmina intacta, nec a quoquam cognita; et si vir non possit aliquos defectus objicere contra uxorem, ob quos cognosci non possit; hæc dictarum mulierum relatio, cum iudicio medicorum et chirurgorum, quamvis dubio, unâ cum cæteris prædictis indiciiis (videlicet, in eo quod mulier si juvenis, et quod concubuit cum viro, per triennium, ac quod, ex aspectu, apta et idonea videatur, ad procreationem) sufficiunt ad divortium; seu potius ad pronunciandum, nullum ab initio, matrimonium fuisse inter huiusmodi personas; easque ab invicem, et ab omni vinculo, et fœdere conjugali, liberas, et immunes fuisse, et esse.”—Oughton, tit. 217.

In France, about the middle of the sixteenth century, a species of proof, called *Le Congres* (*coitus coram testibus*) was introduced in that kingdom, but was abolished by an arrêt of the 18th February, 1677.—*Dictionnaire des Sciences Medicales*, art. *Congres*, by Marc-Mahon, 1 vol. p. 70. See Poynter on Marriage and Divorce, 135—137, 2d ed.

(y) *Pollard v. Wybourn*, 1 Hagg. Eccl. R. 725.

(z) Ayl. Parer. 228.

impotence; such proof, even as collateral, is always received with caution.(a)

In a suit of nullity by reason of the man's impotency, the court always requires a certificate of medical persons as to the state and condition of the woman. The invariable practice is not to give reasons in the certificate; it is sufficient if the certificate state that the marriage had never been consummated, and that the woman was *virgo intacta*, yet she was *apta viro*. In the first place it is a received maxim, "*cuiuslibet in arte sua credendum est*." Secondly, if the grounds were given, how could the court comprehend the reasons, and decide between conflicting opinions? Besides, the introduction of the grounds would lead the court into minute inquiries about matters, the discussion of which the court would be most anxious to avoid, unless it were imperatively called upon to pursue the investigation.(b)

It is not necessary that the party's answers should be given in, or that he should submit to medical inspection. If such a rule prevailed, the man would only have to withdraw out of the reach of the process of the court, and thus defeat the ends of justice, and defraud the woman of her remedy; therefore in a case where the court was satisfied that there was no collusion, and the man having been personally served with a monition at Cassel in France, to submit himself to \*medical inspection, but had not obeyed [ \*207 ] the process, the court relieved the lady, on evidence of the husband's impotency.(c)

*Effect of the Sentence of Separation.*—By the canon law, the marriage is not absolutely dissolved; the parties are separated; and if the church is deceived, the former marriage is to be renewed; and if a second marriage is contracted, it becomes null and void. Sir J. Nicholl said, "What a state to place the parties in. This is something in the text law which I cannot readily assent to belong to the law of this country."(d)

It is said a man may be *habilis* and *inhabilis* at different times where the inability is *ex maleficio*; but if a man has a perpetual and natural impotency, it is impossible for him to be *habilis* at any time.(e)

There is an early case, although on account of the circumstances with which it is attended, it may not be entitled to much weight, in which it was held, that the impotence of a man with respect to a particular woman, was a sufficient ground for divorce.

Lady Essex had, on her petition to King James the First, obtained a commission under the great seal, directed to the Archbishop of Canterbury and five other bishops, &c. to proceed in a cause of

(a) *Norton v. Seton*, 3 Phill. R. p. 160.

(b) *Pollard v. Wybourn*, 1 Hagg. Eccl. R. 725.

(c) *Pollard v. Wybourn*, 1 Hagg. Eccl. R. 725. "Quamvis utroque conjugo fatente impedimentum ac triennio lapsa, sanum consilium sit facere conjuges inspicere; at id non est necessarium."—Sanchez, lib. 7, Disp. 108, No. 6.

(d) 3 Phill. R. 162, 164.

In a case of bastardy, the wife sued a

divorce for frigidity, and afterwards the husband married another woman by whom he had issue; and it was adjudged that the second marriage was void; and the civilians gave the rule—*qui aptus est ad unam aptus est ad aliam, et quando potentia reducit ad actum debet redire ad primas nuptias*.

*Stafford v. Mongy*, Dyer, 179, n. See 4 Vin. Abr. 221, 222.

(e) Ayliffe's Parer. 228; *Bury's Case*, 5 Rep. 98, b.

nullity of marriage between the Earl of Essex and herself, by reason of his frigidity. And the libel against him was, that for three years after the marriage they did cohabit as man and wife, but before and since the marriage he had a perpetual impotency, at least in respect of her. The earl replied he was frigid *quoad illam*, but not as to any other woman, for he found that she was not *apta* to have children. Thereupon the commissioners appointed three ladies and two midwives to inspect her, who returned that she was *\*apta et habilis*; and because the law presumes that where [ \*208 ] there has been three years cohabitation after marriage, without any act of consummation, there must be *impotentia cœundi in viro*, a divorce was pronounced, with liberty to the parties to marry again.(f)

If a man divorced by reason of perpetual impotence in himself marries again, the issue of the second marriage is legitimate. The wife of one Bury was divorced from him on account of frigidity, it appearing that for three years after the marriage she remained *virgo intacta* on account of the husband's impotency, and that he was *inaptus ad generandum*. The husband afterwards married again, and his wife had children. The question was whether they were legitimate or not? And it was decided that they were; for by the divorce *causâ frigiditatis* the marriage was dissolved *a vinculo matrimonii*, and consequently each of them might marry again; and admitting the second marriage to be voidable, yet it continued a marriage until it was dissolved, and consequently the issue of such marriage was legitimate, if no divorce was obtained during the lifetime of the parties.(g)

*When Suit cannot be entertained.*—A person is not entitled to a divorce who knowingly contracts marriage with an impotent person.(h) So, by the canon law, if a man contract, knowing the defect of the woman, he is not to come for a remedy.(i) So if a party, knowing his own defect, contracted a marriage, he could not be heard. The assertion of the defect by the man himself, raises the presumption that he contracted the marriage *scienter*, that he cohabited *scienter*, and defrauded the woman.(k)

By the canon law a man may sue for a nullity of marriage by reason of his own impotence. If a man alleges his frigidity, and the wife alleges the same, and can prove the same \*by seven compurgators, [ \*209 ] they may be separated; such a mode of proof is not, however, adopted in England.(l) Sanchez considered it as a question whether the impotent party may apply for a divorce; and he holds he may under circumstances, but limits it by certain restrictions.(m) It

(f) 2 Howell's St. Tr. 786. 804; 2 Leo. 172, 173.

It is said, that the countess, under a pretence of modesty, having obtained leave to put on a veil when she was inspected, introduced a young woman of her age and stature dressed in her clothes, to be searched in her place, and deceived the jury of matrons and the court.

2 Howell's St. Tr. 803, n.; Salm. St. Tr. 61.

(g) *Bury's case*, Dyer, 179, a; 5 Rep. 98, b.

(h) Ayliffe's Parer. 230; Brower. X. 4, 15, 4.

(i) 3 Phill. R. 161.

(k) 3 Phill. R. 162, 163.

(l) 3 Phill. R. 162.

(m) *Cœterum quando impotentia se tenet ex parte viri, res est certa posse ipsum proclamare adversus matrimonium. Quia sua interest ipsum dissolvi, ne compellatur ut*

seems that this doctrine applies only to frigidity, which may be unknown before trial, and not to a case where the bodily defect is apparent. According to Ayliffe,<sup>(n)</sup> this doctrine has been imported from the canon law into the law of this country; he states, "The husband may pray a separation of matrimony on account of a matrimonial impediment, though such impediment proceeds and arises from himself, as from his own impotency and frigidity."<sup>(o)</sup>

It seems that a man will not be allowed to plead his own natural impotency as a ground for a sentence of nullity of marriage. After the most diligent search no instance was found of a party bringing a suit to set aside a marriage on account of his own incapacity; the party complaining has always been the injured party, and generally the suit has been brought by the wife. Sir J. Nicholl said, "It is a strong and almost a conclusive presumption against such a proceeding, that no suit appeared ever to have been brought by any but the injured party, although he did not mean to lay it down that in no possible case, or under no circumstances, a woman might be allowed to bring such a suit."<sup>(p)</sup> In such a case, however, the party is bound to a very strict proof of all necessary facts.<sup>(q)</sup>

[ \*210 ] \*In *Norton v. Seton* the suit was instituted by the husband against his wife to have his marriage declared void. The libel pleaded that the marriage was solemnized by license in 1812, the husband being a bachelor, then 45, and the woman a spinster, 23 years of age. They had cohabited together for seven years; that they were both in health, but that the husband was incapable from bodily defect to consummate the marriage; that his defect was incurable from art, as would appear upon inspection by medical persons. The court dismissed the suit on the ground of its novelty—the age of the man—it being incredible that he could have lived 45 years in ignorance of his defect, which he alleged was apparent on inspection, and such ignorance was incapable of direct proof; the lapse of seven years before the suit was brought; the marriage was by license obtained on the man's affidavit, in which he swore that he knew of no impediment to the marriage. Another objection was, that the proof of the case must rest solely on the evidence of medical men, as no collateral proof could be obtained either by the answers of the wife

onera matrimonii irriti sustinenda atque id constat ubi vir proclamavit, propriam frigiditatem allegans et auditus est. Temperandum est ut liceat viro proclamare suam impotentiam allegando quando illius ignarus fuit tempore matrimonii. Cum enim dolus nemini patrocinari debeat, minimè audietur, si illam tunc norit.—*Sanchez de Matrimonio*, lib. 7, Disp. 114.

(n) 3 Phill. R. 162.

(o) Parer. 230.

(p) *Norton v. Seton*, 3 Phill. R. 163.

(q) Ceteris paribus, magis est habenda fides testificantibus virum esse potentem, quam dicentibus frigidum; ut si æquales numero et peritia sint testes: quod illi verisimiliora ac naturæ aptiora testentur: cum potentia coeundi sit qualitas naturalis, eaque presumatur, dum frigiditas non constat.

Similiter duabus matronis deponentibus feminam esse virginem, potius creditur quam æqualibus eam esse corruptam testantibus. Quia illæ habent naturæ ac juris præsumptionem pro se; virginitas enim præsumitur cum sit qualitas naturalis. Quando res dubia esset, non existentibus verisimilibus conjecturis corruptionis feminæ; nam his existentibus, ut si probetur juvenum dormisse cum ea, plus creditur affirmantibus eam esse corruptam. Ex quo infero in causâ separationis matrimonii ratione impotentis viri, quando de eâ non constat, magis habetur fides ceteris paribus matronis asserentibus feminam esse corruptam. Quod cum dormierit una cum viro sit vehemens corruptionis conjectura.—*Sanchez*, lib. 7. Disp. 113. No. 11.

or by the inspection of her person; the wife being pregnant she could not be called upon to confess that her marriage was not consummated, for that would criminate herself; that the court was called upon to bastardize the issue after a cohabitation of seven years and frequent endeavours to consummate; that the party contracted with a knowledge of his own defect, and therefore could not be allowed to take advantage of his own wrong.(r)

Delay in instituting a suit of this kind, particularly on the part of the husband, is a strong fact against him. In one case a delay of sixteen months, on the part of the husband, in bringing a suit, on account of actual malconformation, was thought an unfavourable circumstance.(s) In another case \*of a suit of nullity of [ \*211. ] marriage, instituted by the husband against the wife, by reason of impotence, by malconformation in her person, after a cohabitation of seven years, Lord Stowell said, "The length of time which has elapsed, is, of itself, almost a bar; for he did not remember any instance in which such a suit had been allowed to be instituted after such an interval; that a period of seven years should be allowed to elapse, in a case where even a very short cohabitation would have sufficed for the discovery, was not allowed by any principle of law with which he was acquainted. In this case there was a strong presumption against the husband, on account of his not having denied the validity of the marriage in former proceedings against him for divorce by reason of adultery.(t) Lapse of time may operate as an absolute bar to such a suit, not brought by the party injured.(u) The modesty of the female sex may account for their forbearance in such a case.(x)

The age of the parties is often material, since the ecclesiastical court in different cases has declined to proceed in suits of this kind, where the parties were at an advanced period of life. In cases of this kind, different considerations have been applied to persons of advanced age, and to those of an earlier period of life, with great reason and propriety. In the case of young persons the injury is greater, in age more advanced the mode of inquiry is less conclusive, and probably more abhorrent to the feelings of the party who is exposed to it.(y)

The court will not interfere in the case of a supervening defect, to which the most vigorous persons are often subject in the decline of life.(z)

In *Briggs v. Morgan*,(a) the suit was brought by the "man by reason of incurable natural malconformation and bodily defects in the person of the woman." The parties were married \*in [ \*212 ] 1818, the wife being then, as it appeared, a widow of fifty years of age, the man of forty-two. The woman had lived with a former husband eighteen years, who had left her his whole property at his death, which was thought to be a favourable presumption for

(r) *Norton v. Seton*, 3 Phill. R. 147. 164.

(s) *Briggs v. Morgan*, 2 Hagg. Cons. R. 330.

(t) *Guest v. Guest*, 2 Hagg. Cons. R. 321. 323.

(u) *Ball v. Ball*, Deleg. 1790; cited 3 Phill. 155. 159.

(x) *Norton v. Seton*, 3 Phill. R. 159.

(y) *Briggs v. Morgan*, 2 Hagg. Cons. R. 328, 330; 3 Phill. R. 331.

(z) *Briggs v. Morgan*, 3 Phill. R. 332; 2 Hagg. Cons. R. 331; *Brown v. Brown*, 1 Hagg. Eccl. R. 524.

(a) 2 Hagg. Cons. R. 324; 3 Phill. R. 325.

the woman. Under the circumstances of the case the court would not subject the woman to the proofs, by which the alleged defect could be satisfactorily established. First, on account of her advanced age at the time of the marriage. The age of the man was not much the subject of observation, except that it was beyond the *octavum lustrum*, at which an experienced writer describes the passions to be in a state of greater composure: at any rate it was thought an age at which disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. Another circumstance of insincerity in the complaint was the delay, and the court gave credit to the proofs of an effective cohabitation of the wife with her former husband, so that it could only be the case of a supervening defect, which was not a subject of legal relief.

In a cause of divorce by reason of cruelty and adultery, promoted by the wife, the marriage took place in November, 1825, and on the 12th October, 1826, the parties separated. The husband alleged in answer that although a marriage was in fact solemnized between the parties, they never cohabited as man and wife, "by reason of some natural impediment and incurable malconformation and bodily defects, which cannot be removed by the art or help of physicians and surgeons." The prayer of the allegation was, "that the marriage might be pronounced to have been void from the beginning."

Sir J. Nicholl said, "the woman was past the age of child-bearing at the time of the marriage; the primary and most legitimate object of wedlock—the procreation of issue—could not operate; and a man of sixty who marries a woman of fifty-two should be contented to take her *tanquam soror*. But here there was a failure of proof on both points, which it was incumbent on the husband to establish, first, that there was an impediment to consummation existing at the time of the [ \*213 ] marriage; and, secondly, that such impediment was incurable. It was pleaded indeed in the husband's allegation, that the disease was natural and incurable. Had it been stated that though incurable, it was merely a supervening defect—the not unusual attendant of advanced age, and in a woman past child-bearing—I do not know that the court would have admitted the plea at all, for I have yet to look for authority that would set aside the marriage, even if these facts now insisted on as sufficient to found a sentence of nullity, were held to be proved." The legality of the marriage was established, on the ground that the husband had failed to prove the disease incurable.(b)

#### SECT. 4.—OF FORCE AND ERROR.

*Marriages obtained by Force, Menaces or Duress.*—A distinct ground for declaring a marriage void is, that it was contracted in consequence of the use of force, menaces, or duress. But(a) such are

(b) *Brown v. Brown*, 1 Hagg. Eccl. R. 524.

(a) The marriage of a woman in such a state of fear as not to know what she said or did, was held a marriage de facto; *Fulwood's case*, Cro. Car. 482. 488. 492. A marriage

by duress in some cases is said to be good, Dyer, 13 a; in others to be merely void; Kel. 52 b.; *Terry v. Browne*, 1 Sid. 65; 1 Roll. Abr. 340, l. 20; Com. Dig. Baron & Feme (B. 6); Vin. Abr. Baron & Feme (A.) pl. 5.

marriages *de facto*, and before they can be avoided as not being *de jure*, it ought manifestly to appear (where there was no forcible abduction) that they were purely the effect of compulsion, and that there was no comparative choice unbiassed by fear of violence, (for strong temptations of interest have sometimes imputed the idea of force) between the consequences respectively of compliance or refusal, but in reality, an absolute unwillingness, and at most an apparent consent only to enter into the solemn engagement; according to the reason of that rule in the Roman civil law, "*Si patre cogente ducit uxorem quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur maluisse hoc videtur.*"(b)

\*In *Harford v. Morris*(c) the marriage was ultimately declared to be void on the ground of force and custody. [ \*214 ] We have already seen, that in that case a girl above the age of legal consent was taken from school and married by one of her guardians.(d) In that case Sir Geo. Hay said, that if the lady acted under terror at the time when the marriage was solemnized, it might be a good ground for setting it aside.(e)

Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatever; for matrimony contracted through any menace or impression of fear, is null and void *ipso jure*; so that it is not necessary to rescind the same by an action, in the civil law called *quod metus causâ*, because all marriages ought to be free. But though matrimony contracted through such a fear as may happen to a man of courage, constancy, and resolution, be null and void *ipso jure*; yet this fear may be purged and done away by a spontaneous cohabitation for so long a time as that the cause of such fear may be presumed to cease and be destroyed thereby, and a spontaneous consent added in its room.(f)

By fear must be understood such a fear as may happen to a man or woman of good courage and resolution; and such as either includes some danger of death, or else some bodily torment and distress, otherwise it can have no operation in law to rescind a matrimonial contract.(g)

The most remarkable case of this kind which has occurred of late years is that of Wakefield; in which case a girl of fifteen years old, the only child of a family distinguished as well for its high respectability as its ample fortune, was inveigled from the boarding-school where she was residing, by a man twice her age, and hackneyed in the ways and arts of the world, aided by his brother and a foreign servant. She was first told that her mother was dying, and then that her father was bankrupt—a tale to which she lent credence more readily, because, by a singular and most unhappy coincidence, the \*failure of a companion's father immediately before, and [ \*215 ] the jocular remark of her own father, who chanced then to want a few pounds in settling the school bills, that he believed he must fail too, recurred to her mind when the story of the bankruptcy was told her, and gave an appearance of truth to all the monstrous

(b) 1 Wooddeson's Lect. 423, 424.

(c) 2 Hagg. Cons. R. 436.

(d) Ante, p. 134—136.

(e) 2 Hagg. Cons. R. 427. See 1 Hagg.

Eccl. R. 359; ante, p. 187.

(f) Ayl. Par. 361, X. 4. 7, 2.

(g) Ayl. Par. 362.



the repealed statutes, are worthy of observation. The taking alone did not constitute the offence under the repealed statute, and it was necessary that the woman taken away should have been married or defiled by the wrong doer, or by some others with his consent.(p)

But the new enactment makes the taking away or detaining a woman, *with intent* to marry or defile her, a complete offence. And it seems that an indictment under the new act must aver that the taking was with an intention to marry or defile, although such an averment was not necessary under the repealed statute.(q)

It was necessary to set forth in an indictment under the repealed statute, that the woman taken away had lands or goods, or was an heir-apparent, and that the taking was against her will, and also that she was married or defiled; such statement being necessary to bring a case within the preamble of that statute, to which the enacting clause clearly referred, in speaking of persons taking away a woman "so against her will."(r)

It was held, that if the first taking away of a woman was forcible, the offence was complete, under the repealed statute, 3 Hen. 7, c. 2, that the offence was not purged by the subsequent compliance of the woman and consent to the marriage,(s) on the ground that an offender should not be exempted from the provisions of the act, by having prevailed over the weakness of a woman whom he had got into his power by such base means.

Under the repealed statute, if the forcible abduction was confined [ \*219 ] to one county and the marriage was solemnized by \*consent in another, the defendant could not be indicted in either: though, had the force been continued into the county where the marriage took place, no subsequent consent would avail.(t) It seems, however, that such an objection will not hold, since the stat. 7 Geo. 4, c. 64, s. 12, which enacts, that a felony or misdemeanor begun in one county and completed in another, may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

It was no excuse that the woman was at first taken away with her own consent, if she was afterwards forced against her will to continue with the offender; for until force was put upon her, she was in her own power, and may from that time be considered as taken against her will, as if she had never consented.(u) So inveigling a woman by confederates, and then detaining and taking her away, was within the statute.(v)

Parties only privy to the marriage, but neither concerned in the forcible taking, nor consenting thereto, were not within the repealed statute.(w)

(p) And. 115; Cro. Car. 486, 489; 12 Rep. 100. cited *ibid.* 596, n. See 7 Mod. 102; Hawk. P. C., Book 1, c. 41, s. 8; East, P. C. ch. 11, s. 4.

(q) Cro. Car. 488. See 1 Russ. C. L. 570, 571; Add. p. xiv. 2d ed.

(r) 1 Hawk. P. C. c. 41, s. 4; 1 Hale, 400; 4 Bl. Comm. 208.

(s) Per Holt, C. J., *Sveendsen's case*, 14 How. St. Tr. 559; *Rex v. Lockhart*, before Lawrence, J., Oxford Spring Assizes, 1804,

(t) *Rex v. Gordon*, 1 Russ. C. L. 572; Add. p. xiv. 2d ed.

(u) 1 Hawk. P. C. c. 41, s. 7; Cro. Car. 485.

(v) *Rex v. Brown*, 1 Ventr. 243.

(w) Hale's P. C. 660; 1 Hawk. P. C. c.

*Evidence of Woman admissible.*—Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the crown, (x) or the prisoner, (y) for she is not legally his wife, a contract obtained by force having no obligation in law. (z) It has been questioned whether her evidence ought to be received, if the actual marriage is valid; as where the woman, after the abduction consents to the marriage voluntarily, and is not induced by any precedent menace. (a) There are however, considerable authorities in favour of allowing her evidence, even in such a case. (b)

In *Wakefield's case*, (c) the defendants were indicted for a [ \*220 ] \*misdemeanor in conspiring to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants. Mr. Baron Hullock was of opinion, even assuming the young lady to be, at the time of the trial, the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. (d)

The unlawful abduction of a girl under the age of sixteen from her parents, or persons having the charge of her is a misdemeanor. By the stat. 9 Geo. 4, c. 31, s. 20, repealing 4 & 5 Ph. & Mar. c. 8, it is enacted, "That if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award." (e)

42, s. 8. As to accessories after the fact, see 1 East, P. C. 453; 3 Chit. C. L. 818.

(x) Gilb. Ev. 120; 1 Hale, P. C. 301, 302; 2 Hawk. P. C. c. 46, s. 78.

(y) *Rex v. Perry*, cited in *Rex v. Serjeant*, 1 Ry. & M. 354.

(z) Gilb. Ev. 120; 1 Hale, P. C. 302; Bull. N. P. 286.

(a) 1 Hale's P. C. 302.

(b) 4 Bl. Com. 209; 1 East, P. C. c. 11, s. 5; 1 Russ. C. L. 577, 2d ed.

(c) Lancaster Spring Assizes, 1827. See the trial, published by Murray, ante, pp. 214—216.

(d) See 2 Russ. C. L. 605, 2d ed.

(e) *Abduction of an Unmarried Girl, under Eighteen Years of Age, in Ireland.*—By 10 Geo. 4, c. 34, sect. 23, it is enacted, "that when any unmarried girl under the age of eighteen years shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall fraudulently allure, take or convey away, or cause to be allured, taken or conveyed away, such girl, out of the possession and against

the will of her father or mother, or of any other person having the lawful care or charge of her, and shall contract matrimony with her or shall defile her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to such imprisonment, not exceeding the term of three years, as the court shall award, and shall be incapable of taking any estate or interest legal or equitable, in any real or personal property of such girl; and such property shall, upon such conviction, be vested from the time of such marriage in such trustees as the lord chancellor, lord keeper, or commissioners for the custody of the great seal in Ireland shall appoint, for the sole and separate use of such girl, in the like manner as if such marriage had not taken place."

*Abduction of an Unmarried Girl under Sixteen Years in Ireland.*—The 24th section enacts, "That if any person shall unlawfully take, or cause to be taken, any unmarried girl under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall

[ \*221 ] \*The taking away a *natural daughter*, under sixteen years of age, from the care and custody of her putative father, was an offence within the repealed stat. 4 & 5 Ph. & M. c. 8.(f) It was also decided that a mother retained her authority notwithstanding her marriage to a second husband, whose assent was not material.(g) It was also decided, on the repealed statute, that the marriage must be clandestine, and to the disparagement of the heirs.(h)

It has been said, that the refusal of the parents or guardians' consent must be continued, and that if once given, it was within the statute, notwithstanding subsequent dissent,(i) but this was merely a dictum, which appears to want confirmation.(k)

It seems to be no legal excuse that the defendant had been frequently invited to the father's house, and used no other art than the common blandishments of a lover, to induce the lady secretly to elope and marry him; if it appear that the father intended to marry his daughter to another person, and so that the taking was against his consent.(l) This offence is within the jurisdiction of the Court of Queen's Bench.(m)

*Impeachment of Marriage on the ground of Error.*—By the canon law there were four species of error forming a ground for impeaching a marriage. The first is *error personæ*, as when a person intending to marry Ann by mistake married Jane. An error of this kind is not only an impediment to a marriage contract, but dissolves it through a defect of consent in the party contracting.(n) No advantage can be taken of such deceit by the person by whom it is practised.

[ \*222 ] Another species of error which by the canon law was an impediment to a matrimonial contract, is styled an error of *condition*; as when a person thinking to marry a free woman, through mistake contracted with a bond woman, and vice versa.(o)

The third species is *error fortunæ*, as when a man intending to marry a rich wife, has in truth, contracted matrimony with a poor one. Such an error, however, did not, by the canon law dissolve a marriage contract made *simply* and without any condition subsisting(p); but it was otherwise by that law, if a person had contracted to marry a woman upon condition that she was worth a certain sum, and the condition was not made good.

The last species of error was that of *quality*, as when a man marries a woman believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflowered, or

be liable to suffer such punishment by fine or imprisonment, or by both, as the court shall award."

(f) *Rex v. Cornforth*, 2 Strange, 1162; 1 Hawk. P. C. c. 41, s. 14; *Rex v. Sweeting*, 1 East, P. C. c. 11, s. 6, p. 457.

(g) *Ratcliffe's case*, 3 Rep. 39.

(h) *Hicks v. Gore*, 1 Mod. 84; 1 Hawk. P. C. c. 41, s. 11: See 1 East, P. C. c. 11, s. 6, p. 457.

(i) *Callthorpe v. Astell*, 3 Mod. 169.

(k) See 1 East, P. C. c. 11, s. 6, p. 457.

(l) *Rex v. Twisleton*, 1 Lev. 257; 1 Sid. 387; 2 Keb. 32; 1 Hawk. P. C. c. 41, s. 10.

(m) *Rex v. Moor*, 2 Mod. 128; 2 Lev. 179; 1 Freem. 444; 3 Keb. 708.

(n) See Sanchez, lib. 7, tit. 18, No. 11. X. 4. 1, 25; D. 24, 4, 1.

(o) X. 4, 9, 2. See Sanchez, lib. 7, Disp. 19.

(p) X. 4, 1, 26.

of mean parentage.(q) But according to the opinion of the canon lawyers, this does not render the marriage invalid, because matrimony celebrated under such kind of error in point of consent, is deemed to be simply voluntary, as to the nature and substance of it, though in respect of the accidents it is not voluntary.(r)

It is perfectly established by our law, that no disparity of fortune, or mistake as to the qualities of the person, will impeach the *vinculum* of marriage. So the representations of a man that he is of superior condition, or has great expectations, will not of itself invalidate a marriage, as the law expects that parties should use timely and effectual diligence in obtaining correct information on such points.(s)

Error about the family or fortune of the individual, though produced by disingenuous representations, does not at all affect the validity of a marriage. A man who means to act upon such representations, should verify them by his own inquiries; the law presumes that he uses due caution in a \*matter in which his happiness for [ \*223 ] life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced.(t)

If a husband can show that he has been imposed upon by a false name, he may upon that ground falsify the marriage, but he must set forth the fraud, and prove it to the satisfaction of the court.(u)

#### SECT. 5.—OF BIGAMY.

*Former Marriage undetermined.*—One of the chief impediments to contracting a lawful marriage is the having a husband or wife, of a prior legal marriage, living at the time of the ceremony of the second marriage.(x)

A second marriage, whilst the former husband or wife is living, is ipso facto, null and void, without any divorce as well by the spiritual as by the common law.(y) *Duas uxores eodem tempore habere non licet*, is the rule of the civil law, which has been adopted and enforced by the codes of all civilized countries.(z)

(q) 39 Q. 1, 1.

(r) Ayliffe's Parer. 362, 363. See Sanchez, lib. 7, Disp. 18, No. 170.

(s) *Ewing v. Wheatley*, 2 Hagg. Cons. R. 182, 183.

(t) *Wakefield v. Mackay*, 1 Phill. R. 137.

(u) *Heffer v. Heffer*, 3 Maule & S. 265.

(x) See ante, p. 89.

(y) 2 Hagg. C. R. 129; 1 Bl. C. 436; 4 B. C. 163; *Pride v. Earls of Bath and Montague*, 1 Salk. 121; Perk. S. S. 304, 305; *Riddleaden v. Wagon*, Cro. Eliz. 857; Com. Dig. Baron & Feme, (B. 6.) Bastard (A.); 1 Roll. Abr. 340, l. 13; Bro. Abr. tit. Bastardy, pl. 8.

(z) By the civil law if the husband or wife had been captive, and had continued in captivity for 5 years, a second marriage was legalized.—“Sin autem in incerto est, an

vivus apud hostes teneatur, vel morte præventus est, tunc si quinquennium a tempore captivitatis excesserit, licentiam habet mulier ad alias migrare nuptias; ita tamen, ut bonâ gratiâ dissolutum videatur pristinum matrimonium, et unusquisque suum jus habeat imminutum. Eodem jure et in marito in civitate degente et uxore captivâ observando.”—Dig. lib. 24, tit. 2, l. 6.

Among modern civilized nations, polygamy has scarce ever been legalized, not even in Muscovy; Charlemagne, at that early period punished it as adultery. It is remarkable that the Mahometans at present, though they practise it themselves, are said to forbid it to the Jews.”—1 Browne's Civil Law, 20; Dr. Madan's Attempt to defend Polygamy. Successive polygamy, that is, a subsequent

[ \*224 ] \*A marriage may be contracted in good faith, and in ignorance of the existence of those facts which constituted a legal impediment to the intermarriage. Such a marriage is described by jurists as "*matrimonium putativum, id est, quod bona fide et solemniter saltem opinione conjugis unius justâ contractum inter personas vetitas jungi.*"(a) This species of marriage was introduced by the canon law, and is unknown in the law of England or Ireland.(b)

We have already adverted to a question which arose upon a marriage of this description in Scotland.(c)

The offence of having a plurality of wives at the same time is more correctly denominated *polygamy*, but the term *bigamy* is more commonly used in legal proceedings. Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists bigamy consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow.(d)

This offence was originally of ecclesiastical cognizance only, but it was made a felony by stat. 1 Jac. 1, c. 11. This statute has been repealed, but remains in force as to all offences within it committed before or upon the last day of June, 1828.(e)

*Punishment of Bigamy.*—By 9 Geo. 4, c. 31, s. 22,(f) it is enacted

[ \*225 ] that if any person, being married, shall marry \*any other person during the life of the former husband or wife,

marriage after the death of the first consort, was esteemed indecorous, but not forbidden by the canon law.

Archdeacon Paley, after alluding to the equality in the number of males and females born into the world, and the indication of the Divine will by the creation at first of only one woman to one man, observes, "Polygamy not only violates the constitution of nature, and the apparent design of the Deity, but produces to the parties themselves, and to the public, the following bad effects; contests and jealousies amongst the wives of the same husband; distracted affections, or the loss of all affection in the husband himself; a voluptuousness in the rich, which dissolves the vigour of their intellectual as well as active faculties, producing that indolence and imbecility both of mind and body, which have long characterised the nations of the East; the abasement of one-half of the human species, who, in countries where polygamy obtains, are degraded into mere instruments of physical pleasure to the other half; neglect of children; and the manifold, and sometimes unnatural mischiefs, which arise from a scarcity of women. To compensate for these evils, polygamy does not offer a single advantage."—Paley's Moral and Political Philosophy, B. 3, part 3, ch. 6.

(c) Hertius de Matrim. Putat.

(d) See 1 Burge on For. Law, 152.

(e) See 1 Burge on For. Law, 152.

n. 5. See Rec.  
1. L. tit. Big.

any, Polygamy.

(e) Stat. 9 Geo. 4, c. 31, s. 1.

(f) *Irish Statute against Bigamy.*—By 10 Geo. 4, c. 31, s. 26, it is enacted, "That if any person being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in Ireland or elsewhere, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county: Provided always, that nothing herein contained shall extend to any second marriage contracted out of Ireland by any other than a subject of his majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose marriage shall have been de-  
termination of any court of

whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county; provided always that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

An indictment for bigamy committed in one county, but found by a jury of another county where the prisoner was \*apprehended, must contain an averment as to the place or [ \*226 ] county where the prisoner was apprehended.(g)

This statute differs in some important points from the former one, 1 Jac. 1, c. 11, s. 3, under which a person whose consort had been abroad for seven years, though known to be living, might have married again with impunity.(h) And so might a person who had been divorced *a mensâ et thoro*.(i) It will be observed, that by the 9 Geo. 4, c. 31, s. 22, the divorce must be from the bond of marriage.

*Presumption as to death of former Consort.*—The presumption of law is in favour of innocence; thus where a woman had married again within the space of twelve months after her husband had left the country, the presumption that she was innocent of the bigamy was held to preponderate over the usual presumption of the continuance of life.(k)

There is no strict presumption of law on questions of fact as to the existence of human life, without reference to accompanying circumstances, as the age or health of the party. If the first consort be shown to have been alive within a short time of the second marriage, the law in favour of innocence cannot presume that the party was not alive at the actual time of the second marriage.

Where upon a question as to the validity of a marriage between A. and C. it appeared that A.'s first wife B. was alive in a distant colony 26 days before the second marriage, it was held that the sessions or jury were justified in finding the second marriage to be void: neither the sessions nor a jury trying an issue as to the validity of

(g) *Rex v. Frazer*, 1 Mood. C. C. 407.

(h) 4 Bl. Comm. 164; 3 Inst. 88; 1 Hale P. C. 692.

(i) *Porter's case*, Cro. Car. 461, where the

divorce was for cruelty; 4 Bl. Comm. 464; 1 Russ. C. L. 189, 2d edit.

(k) *Rex v. Twynning*, 2 B. & Ald. 386.

such a marriage being bound to presume the death of B. in favour of the innocence of A. in contracting a second marriage, but may look to the evidence in each particular case.(l)

*Sentence of Ecclesiastical Court.*—Another defence on a charge [ \*227 ] of bigamy is, that the former marriage has been declared \*void by the sentence of a court of competent jurisdiction. A sentence against a marriage in a suit of jactitation is not conclusive evidence against an indictment for bigamy, for such sentence may be impeached by showing that it was obtained by fraud or collusion.(m)

On an indictment for bigamy, where the first marriage is in England, it is not a valid defence to prove a divorce *a vinculo matrimonii* out of England before the second marriage, founded on grounds on which a marriage cannot be dissolved *a vinculo matrimonii* in England.

Lolley having been married in England subsequently went to Scotland, and there procured a divorce, and then returned to England, where he married a second time, his former wife being living, and he was in consequence tried for bigamy. His defence was, that he had been legally divorced in Scotland: but the twelve judges, to whom the case was referred, were unanimously of opinion, that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii*, for grounds on which it was not liable to be so dissolved in England, and that no divorce of an ecclesiastical court was within the exception in the 3rd section of 1 Jac. 1, c. 11, unless it was the divorce of a court within the limits to which that statute extended.(n)

If a marriage be declared void by an ecclesiastical sentence, and there be an appeal to a higher spiritual tribunal, which by suspending the sentence is a supposed continuation of the marriage, yet one of the parties marrying again does not incur the penalties of the law, although such second marriage is indeed unlawful.(o)

On a trial for bigamy, the registry of the first marriage stated it to be by license generally, without saying by consent of parents or guardians; the prisoner proved that he was an infant at the time, and that his parents were never known to have been in England. This [ \*228 ] was held to be *prima facie* \*evidence that the first marriage was without consent of parents or guardians, and that the jury might have acquitted the prisoner, if such evidence was unanswered.(p) It seems that on such trial the prisoner ought not to be called on to prove a negative, it being sufficient for the prisoner to prove himself under age at the time of the first marriage, and it then rested with the prosecutor to show that the marriage was with the consent of parents or guardians.(q)

(l) *Rex v. Inhabitants of Harborne*, 4 Nev. & M. 341; 2 Ad. & Ell. 540. See *Doe d. Knight v. Nepean*, 2 Nev. & M. 219; 5 B. & Ad. 86; *Watson v. King*, 1 Stark. N. P. C. 21.

(m) *Duchess of Kingston's case*, 20 How. St. Tr. 355; 1 Leach, C. C. 146; 1 East, P. C. 468.

(n) *Rex v. Lolley*, Russ. & Ry. C. C. 237.

See observations on this case in *Warrender v. Warrender*, 2 Clark & Finn. 546—551. 557—559; *Tovey v. Lindsay*, 1 Dow, 118.

(o) Gibson's Cod. tit. 22, c. 4; 3 Inst. 89; 1 Hale P. C. 694.

(p) *Rex v. James*, R. & R. C. C. 17; 1 Russ. C. L. 201.

(q) *Id.*; *S. P. Rex v. Morton*, R. & R. C. C. 19, n.; 1 Russ. C. L. 201.

Where, on an indictment for bigamy, the first marriage was proved to have been by license, and that the party was under age at the time of such marriage, but it did not appear that the marriage was with consent of parents or guardians:—it was held to lie on the part of the prosecutor to prove such consent given.(r)

The marriage however of a minor by license without the consent required by the 4 Geo. 4, c. 76, s. 16, is valid.(s)

On an indictment for bigamy, if the first marriage was by banns, it is no objection that the parties did not reside in the parish where the banns were published and the marriage celebrated.(t) It seems that assuming a fictitious name upon the second marriage will not prevent the offence from being complete.(u) On an indictment against a man for bigamy, it appeared that for the purpose of concealment the second wife was married by a name by which she had never been known. This was held to be no answer to the charge, although if the first marriage had taken place under such circumstances, that would have been thereby rendered void.(x) And if the prisoner have written down the names for the publication of banns, he is precluded from saying that the woman \*was not known by the [ \*229 ] name he delivered in, and that she was not rightly described by that name in the indictment.(y)

*Proof of a former Marriage subsisting.*—The indictment must state the two marriages, and aver that the former consort was alive at the time of the second marriage. In a prosecution for bigamy, although a lawful canonical marriage need not be shown, a marriage de facto subsisting at the time of the second marriage must be proved.(z) A marriage voidable by reason of consanguinity, affinity or the like, is sufficient, for it is a marriage in judgment of law until avoided.(a)

Upon indictments for bigamy, it is not enough to prove a marriage by reputation, but either some person present at the marriage must be called, or the original register, or an examined copy of it, must be produced.(b) It should seem, however, not to be necessary to prove a compliance with all the requisites of the 28th sect. of 4 Geo. 4, c. 76; for upon a provision nearly similar in the former marriage act, it was held not to be necessary to call one of the subscribing witnesses to the register, in order to prove the identity of the persons married; but that the register or a copy of it, being produced, any evidence which satisfied the jury as to the identity of the parties was sufficient, as if their handwriting to the register were proved, or that the bell-ringers were paid by them for ringing for the wedding, or the like;(c) but if the marriages be proved by a person present at them, it is not necessary to prove the registration, or license or banns.(d) It seems

(r) *Rex v. Butler*, R. & R. C. C. 61; 1 Russ. C. L. 202.

(s) *Rex v. Birmingham*, 2 M. & R. 238; 8 B. & C. 29. See *Rex v. Waully*, 1 Mood. C. C. 163; Lew. C. C. 23.

(t) *Rex v. Hind*, Russ. & Ry. C. C. 253.

(u) *Rex v. Allison*, Russ. & Ry. C. C. 109.

(x) *Rex v. Penon*, 5 C. & P. 412.

(y) *Rex v. Edwards*, Russ. & Ry. C. C. 263.

(z) 1 W. Bl. R. 632; 1 East's P. C. 469.

(a) 3 Inst. 88; 1 East's P. C. 466; but now see stat. 5 & 6 Wm. 4, c. 54, ante, pp. 155, 156.

(b) *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, 1 Dougl. 162.

(c) 1 East P. C. c. 12, s. 11, p. 472.

(d) *Rex v. Allison*, Ru. & Ry. C. C. 109. The want of due publication of banns may be shown on the other side; *Standen v. Standen*, Peake, 32.



doubtful how far the acknowledgment alone of the defendant upon the subject of his marriage is sufficient evidence of that fact, unless coupled with circumstances showing a marriage.(e)

After proof of the first marriage the second wife may be a witness; but it is clear that the first and true wife cannot be admitted [ \*230 ] to give evidence against her husband, nor to establish \*the first marriage.(f) But the second wife is competent to prove the marriage, for she is not his wife even de facto.(g)

*Jurisdiction of Ecclesiastical Courts.*—It is to be observed, that if a person marrying again come within the two first exceptions in the act;(h) though the second marriage is not felony, yet it is void, and the parties will be subject to the censures and punishment of the ecclesiastical courts.(i)

In a suit of nullity of marriage, by reason of a former marriage, strict proof of the identity of the parties is requisite. It is a clear rule that the identity must be proved by other testimony than that of the parties themselves, that is, by witnesses who can speak to the facts from their own personal knowledge. This rule is adopted as a guard against imposition, and the danger of a marriage being set aside by collusion between the parties.(k)

*Conviction for Bigamy not conclusive in Ecclesiastical Courts.*—As a general rule it seems that a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded in a civil proceeding.(l) Thus where the father was acquitted on an indictment for having two wives, it was held that the record was not evidence in a civil case, where the validity of the second marriage was controverted.(m)

Sir John Nicholl said, that, generally speaking, however, he apprehended the true rule to be, that a record of conviction [ \*231 ] \*is evidence of the *same fact* in a civil cause, only that it is not *conclusive evidence*. This is the rule to be collected from the following case, as cited by Chief Baron Gilbert:(n) "If a man has two wives, and be thereof convicted, and dies, and the second wife claims dower, the verdict and conviction cannot be given (i. e. conclusively given) in evidence; but in this case, the writ must go to the bishop; for whether the marriage be lawful or not is the point in controversy, and that is of ecclesiastical jurisdiction, and is not to be decided at common law. But the verdict may be made an exhibit in

(e) *Rex v. Truman*, 1 Russ. C. L. 207; 1 East P. C. c. 12, s. 10, pp. 470, 471.

(f) 1 Hale P. C. 693; 1 East P. C. c. 12, s. 9, p. 469; 1 Hawk. P. C. c. 42, s. 8; *Gregg's case*, Sir T. Raymond, 1.

(g) 1 Hale P. C. 693; Gilb. Ev. 120, 6th ed.

(h) 9 Geo. 4, c. 31, s. 22, ante 225.

(i) 4 Bl. Comm. 164, n. (3).

"Si quis solemnizaverit matrimonium cum una, et postea convolverit ad secundas nuptias; si legitima uxor cupit viro suo restitui, instituenda est lis, in causâ divortij a vinculo matrimonii, et restitutionis obsequiorum conjugum:—Lis tamen est ista instituenda, tam contra superinducentem,

quàm contra superinductam; alias sententia divortij lata contra virum [non vocatâ superinductâ muliere] non valet quoad eam nec ei lis hujusmodi præjudicabit; quod alias faceret, si vocata, et lis prædicta contra utrosque instituta fuisset. Quæ dicta sunt, de muliere, locum etiam habent, de viro."—Oughton, tit. 193, ss. 4, 5.

(k) *Searle v. Price*, 2 Hagg. Cons. R. 187; *Bayard v. Morpew*, 2 Phill. R. 321.

(l) 1 Starkie on Evid. 219.

(m) Gilb. Evid. 35; Bull. N. P. 233, 233. See *Boyle v. Boyle*, Comberb. 72; 3 Mod. 164; *Hudson v. Robinson*, 4 Maule & S. 479.

(n) Law of Evidence, 28, 6th edit.

the cause before the bishop, to induce him to believe there was a former marriage."

It seems, therefore, that if A. be convicted of bigamy by reason of his marriage with C. living B. his first wife, it is still competent to A., on C's death, to propound his interest as the lawful husband of C. in a suit in the ecclesiastical court, touching the administration of her effects, and to succeed in such suit on proof of the validity of such marriage, notwithstanding his said conviction for bigamy pleaded and proved.(o)

In a later case the party convicted of bigamy was allowed to plead and prove, in a suit in the ecclesiastical court for nullity of marriage on account of a former subsisting marriage, the invalidity of the first marriage. The court, however, held, that in this case the defence set up was not made out in evidence; but that the defendant's first marriage was valid and subsisting at the time of his marriage *de facto* with the complainant, and consequently that she was entitled to a sentence of nullity.(p)

On a citation issuing, as in a cause of nullity of marriage by reason of a former marriage, the court will not pronounce a sentence of nullity by reason of an undue publication of banns, the woman being therein described as spinster, the first husband having died subsequent to the publication of the banns but prior to the marriage.(q)

(o) *Wilkinson v. Gordon*, 2 Add. R. 152.

(q) *Wright v. Elwood*, 2 Hagg. Eccl. R.

(p) *Bruce v. Burke*, 2 Addams, 471.

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## CHAPTER IV.

[ \*363 ]

### OF DIVORCE.

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#### SECT. 1.—GENERAL OBSERVATIONS ON DIVORCE.

*Meaning of Divorce.*—The meaning of the word divorce is separation; its derivation is sufficiently plain from *divertere*, to turn away. In its most general acceptance it means the complete lawful separation of husband and wife: Divortium a diversitate mentium dictum est, quia in diversas partes eunt qui distrahunt matrimonium.

A divorce is a lawful separation of husband and wife made before a competent judge on due cognizance had of the cause, and sufficient proof made thereof.(a) According to another definition, it is a sentence pronounced by an ecclesiastical judge, whereby a man and a woman formerly married to each other are separated and parted.(b)

(a) *Ayl. Parer*. 225.

(b) *Godol. Abr.* 493.

*Two kinds of Divorce.*—Divorce, according to the canon law, is twofold: the first being only a separation from bed and board *a mensa et thoro*; the other, an entire dissolution of the marriage *a vinculo matrimonii*. The first happens when mutual cohabitation or conversation is forbidden to the parties either with a time, or without any time prefixed for their coming together again. By the second the marriage is entirely dissolved; and as to the substance of it, forever rescinded.(c)

Divorce *a mensa et thoro* is when the marriage is just and lawful ab initio, and therefore the law is tender of dissolving it; [ \*364 ] but for some supervenient cause, it becomes improper or impossible for the parties to live together. Although in England the mutual obligations attending the condition of husband and wife cannot be extinguished, yet for the protection and relief of individuals these obligations may be suspended; but only by the sentence of an ecclesiastical court, which separates the parties *a mensa et thoro*; and this sentence of divorce or rather separation, so far from dissolving the matrimonial tie, and permitting the parties to marry again, by its very tenor contemplates the possibility of reconciliation and renewed cohabitation;(d) and it is in conformity to this notion that the injured party, before becoming entitled to the benefit of the sentence, is, according to the injunction of the 107th canon,(e) obliged to enter into a bond for the observance of a chaste and continent life, without contracting marriage during the lifetime of the offender.

The only causes for which divorces are granted by the ecclesiastical courts of England are—first, adultery; second, cruelty; third, unnatural practices. The two first grounds will be considered at length; the third is dismissed with the only reported cases mentioned in the subjoined note.(f)

(c) Ayl. Parer. 225.

(d) "Wherefore, and by reason of the premises, we do pronounce, decree and declare, that the said A. B. ought by law to be divorced, and separated from bed, board, and mutual cohabitation with the said C. B. her husband, until they shall be reconciled to each other; and we do by these presents divorce and separate them accordingly, bond being first given on the part of the said A. B. according to the tenor of the canon in that case made and provided, that she, the said A. B., shall live chastely, and shall not contract any other marriage during the lifetime of the said C. B., intimating, nevertheless, and by such intimation expressly inhibiting, according to the ecclesiastical laws and canons made in that behalf, as well the said A. B. as the said C. B. that neither of them in the lifetime of each other shall in anywise attempt or presume to contract another marriage, &c."—Extract from a form of a sentence in a cause of divorce, Poynter, 182.

(e) See post, p. 376, n. (m).

(f) "Tenendum est sodomiam sufficere ad divortium. Quia sodomia est gravior de-

lictum adulterio. Si ergo ob adulterium permittitur divortium; idem a fortiori dicendum erit de sodomia; Sanchez, lib. 10, Disp. 4, s. 3.

In one case a lady founded her claim to a divorce *a mensa et thoro* on a verdict of a jury that her husband was guilty of sodomitical practices with A. B., for which he was sentenced to two years imprisonment. The judge rejected the libel, and the lady appealed to the Delegates. For the respondent it was objected that there was no case where even actual sodomy had been deemed a sufficient cause for a divorce; a fortiori, a mere attempt to commit it could not be deemed sufficient. That supposing it to be sufficient cause, the libel ought to have stated the facts from which the guilt was to be inferred, which should have been again the subject of proof; and that merely stating the verdict, and producing the record of it, could not entitle the lady to a divorce. But the judges thought the objections insufficient; reversed the sentence of the court below, and pronounced for the divorce. The lady afterwards obtained an act of parliament, by which the marriage was dissolved; *Bramley*

\*The proof of a valid marriage is a necessary preliminary in all suits for divorce: it follows, therefore, that [ \*365 ] no cause or impediment existing previous to marriage can, properly speaking, be the subject-matter of a suit for divorce; the civil and canonical disabilities which render the marriage contract either void or voidable, are grounds for a proceeding for nullity of marriage, but not, correctly speaking, for a divorce.(g) A marriage which is void from the beginning, and may be declared so by the sentence of an ecclesiastical court, cannot be said to be dissolved, because it was never legally constituted, and marriages void in themselves can have no legal effect.

The causes for separation *a vinculo*, or rather of nullity of marriage, are—consanguinity, or affinity within the prohibited degrees,(h) mental incapacity,(i) impotence,(k) force and error,(l) impuberty, where at the time of the marriage either party was under the age of consent,(m) and a prior valid marriage subsisting between either of the parties.(n)

The distinction between divorce from bed and board, and from the bond of matrimony, is not mentioned in Scripture, and was unknown to the ancient church. It was devised by the canonists and schoolmen to serve the pope's purposes, and first established by the decrees of the Council of Trent.(o)

The commissioners appointed by Henry VIII. and Edward VI. for reforming the ecclesiastical law, in their elaborate report [ \*366 ] \*recommend divorces *a mensa et thoro* to be abolished, and complete divorces to be allowed for adultery, desertion, bad treatment, &c.; the innocent party to be allowed to marry again; the offending party to be punished by banishment or imprisonment.(p)

*Great Diversity in the Laws relative to Divorce.*—It is evidently most essential to every view of public expediency, as well as of justice between private parties, that of all contracts, that of marriage should have a fixed and indelible character, which it shall not be in the power of either party to alter at pleasure. But the municipal laws as to divorces in almost every state, ancient and modern, are peculiar and local. These too are sometimes quite opposite even in neighbouring provinces of the same state. Quotations from the codes of different countries would only prove that perfect agreement between

v. *Bromley*, Feb. 1704, 2 Burn's Eccl. Law, 499, n.; 2 Addams, 158, n.

The wife's libel in a divorce cause charging cruelty and unnatural practices, the husband having been convicted of an assault with an intent to commit the latter, was admitted to proof, the case charged (at least taken as a whole) being held to be one "*per quod consortium amittitur*." The libel having been afterwards proved in all particulars, the court pronounced for the divorce as prayed by the wife; *Mogg v. Mogg*, 2 Addams, 292.

(g) *Godolph. Abr.* 500.

(A) *Ante*, 157, 183.

(i) *Ante*, 183, 201.

(k) *Ante*, 201, 213.

(l) *Ante*, 213, 223.

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(m) *Ante*, 282, 285.

(n) *Ante*, 223, 231.

(o) See Bishop Cozen's argument, 13 How. St. Tr. 1332—1338; 2 Toullier, 86; see post, p. 375.

(p) *Mense societas et thori solebat in certis criminibus adiungi conjugibus; salvo tamen inter illos reliquo matrimonii jure; quæ constitutio cum à sacris literis aliena sit, et maximum perversitatem habeat et malorum sentinam in matrimonium comportaverit, illud auctoritate nostrâ totum aboleri placet.*" *Reformatio Legum de adulteriis et Divoritiis*, c. 19, p. 55; see *Giba. Cod.* 535, ante, p. 23; 1 Hallam's Const. Hist. 138 n.; 7 Lingard's Hist. 127.

any two of such codes as to the extent of the remedy to be afforded for conjugal wrongs, if it exists at all, is extremely rare, and that there is scarcely any other point on which such unbounded freedom of judgment has been exercised by each legislature.(q) No example can be more striking than that of the three kingdoms of the British empire, in two of which marriage is indissoluble by judicial sentence, while in Scotland it may be dissolved either for adultery or continued non-adherence after legal requisition.(r)

Upon the continent of Europe there has long existed a known distinction between the catholics and protestants on the subject of divorce. The former, according to the doctrine of the Romish church, consider marriage as a sacrament, and in its effect to be governed by the divine law; and according to their interpretation of that law it is indissoluble.(s)

The protestants on the contrary, have not always considered it as a sacrament; but many, if not most of them, have considered it mainly as a civil institution, subject to the legislative authority as matter of public police and regulation.(t)

In Catholic France, until the year 1792, sometime after the revolution, marriage was always treated as indissoluble. "Our church," says Merlin, "never approved of divorce properly so called. It has always regarded it as contrary to the precept, *Quod Deus conjunxit, homo non separet*,—What God hath joined together, let no man put asunder.(v) It is therefore a perpetual maxim among us, that marriage cannot be dissolved by means of a divorce."(x)

Pothier says, "Marriage is not dissolved but by the natural death of one of the parties; while they live it is indissoluble."(x) He adds, that though divorce was permitted by the Christian emperors, the church regarded it as prohibited by the Gospel; and that it is not permitted by the French law for any cause whatsoever.(y)

By the law of the French revolutionary government, incompatibility of temper was made a ground of divorce at the pleasure of the parties.(z) By the code civil a divorce may be judicially obtained for the cause of adultery, excess, cruelty, grievous injuries of either party, and in certain cases by mutual and persevering consent.(a)

(q) See 1 Burge on Foreign Law, 640—663.

(r) Stair's Institutes, book 1, tit. 4, ss. 7, 8.

(s) See Fergusson's R. Appendix, p. 443, n.; M. Heinecc. Elem. Juris Germ. tit. 14, ss. 328—332; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 63, 64, 67. 1 Burge, 643.

(t) 1 Bl. Comm. 433; 2 Hagg. Cons. R. 63, 67; Story, Conflict of Laws, 174.

(v) Matthew, ch. 19, v. 6.

(u) Merlin, Répertoire Divorce, sect. 3.

(x) Pothier, Traité du Mariage, art. 462.

(y) Ibid. art. 466.

(z) In the three first months of the year 1793, the number of divorces in Paris is said to have amounted to 562; the marriages were 1785. See Burke's Works, 8th vol. p. 176.

(a) Code Civil, art. 229—233; see Toul-

lier, p. 40—62, 63; Manuel de droit Français, p. 58—66; 1 Burge, 645.

By a law of the 8th May, 1816, divorce a vinculo was abolished in France, for which a separation was substituted.

1. Le divorce est aboli.

2. Toutes demandes et instances en divorce pour causes déterminées sont converties en demandes et instances en séparation de corps; les jugemens et arrêts restés sans exécution par le défaut de prononciation du divorce par l'officier civil, conformément aux articles 227, 264, 265, 266, du Code Civil, sont restreints aux effets de la séparation.

3. Tous actes faits pour parvenir au divorce par consentement mutuel sont annulés; les jugemens et arrêts rendus en ce cas, mais non suivis de la prononciation du divorce, sont considérés comme non avenus conformément à l'article 234. Les Cinq Codes,

Protestants have treated this subject differently. In Scotland, \*which professes to be governed in this subject [ \*368 ] exclusively by the Scriptures, divorce is allowed for the scriptural causes for adultery, and for wilful desertion.(b) In many protestant countries, it is not treated as indissoluble, except for scriptural causes; but it may be dissolved for other causes.

By the laws of Holland, of Prussia, and other Protestant states of Germany, of Sweden, of Denmark, and of Russia, divorce *a vinculo matrimonii* may be granted not only for adultery but for other causes.(c)

The supreme courts of judicature of the presidencies in the East Indies on the ecclesiastical side, grant sentences of divorce *a mensa et thoro*.(d)

In the West India colonies, except British Guiana, St. Lucia and Trinidad, there exists no authority in any judicial tribunal to entertain a suit for a divorce, nor does the parent state permit their legislatures to grant it. It is an instruction to governors of colonies not to give their assent to any act of the other two branches of the legislature for dissolving a marriage. Neither is there any court having authority to grant separation *a mensa et thoro*. In consequence of this defect of jurisdiction, the courts of chancery, of Jamaica and Barbadoes have entertained suits, and granted maintenance to a wife, living apart from her husband, in consequence of the conduct of the latter, when, without that interposition, she would be destitute of the means of support.

In Nova Scotia,(e) a power was vested by the governor and council of dissolving marriages for adultery, cruelty, wilful desertion, and withholding necessary maintenance for three years together; but by a subsequent statute this power has been confined to cases of adultery and cruelty.(f)

In New Brunswick, the power of granting divorce from the bond of matrimony, and a separation from bed and board, is also vested in the governor and council.(g)

\*In St. Lucia and Lower Canada divorces are governed by the law of France as it existed before the Rev- [ \*369 ] olution.

In Mauritius divorces are granted under the code civil.

In Trinidad the marriage cannot be dissolved; but a separation *a mensa et thoro* is grantable for those causes which are authorized by the canon law.(h)

In British Guinea, the Cape of Good Hope, and Ceylon, divorces are governed by the law of Holland.(i)

In some of the United States, Georgia and Mississippi, divorces

par Siréy, 498. Manuel de Droit Français.

(b) Ersk. Inst. B. 1, tit. 6, ss. 43, 44; Fergusson's Rep. 423, note H.; Stair's Institutes by Brodie, 28.

(c) Fergus. Rep. 202; see Frederician Code, 1 vol. 125—134; Henry's Institutes of laws of Holland, 88—91; see Prussian Code, published at Berlin, 1795, vol. iii. p. 84; and Fergus. R. 448—454.

(p) See Report on Perry's Divorce Bill,

ordered to be printed by House of Lords, 27th January, 1840. See stat. 1 Geo. 4, c. 104.

(e) Nova Scotia Law, 32 Geo. 2, c. 17.

(f) 1 Geo. 3, c. 7,

(g) Laws of New Brunswick, 31 Geo. 3, c. 5.

(h) Febrero, tom. i. tit. 2, c. 1, s. 13.

(i) 1 Burge on Foreign Law, 660, 661, 648.

are restrained, even by constitutional provisions, which require to every valid divorce the assent of two-thirds of each branch of the legislature, founded on a previous judicial investigation and decision. The policy of other states is exceedingly various on this subject. In several of them(*k*) no divorce is granted but by a special act of the legislature, according to the English practice; and so strict and scrupulous has been the policy of South Carolina, that there is no instance in that state, since the revolution, of a divorce of any kind either by the sentence of a court of justice, or by act of the legislature. In all the other states, divorces *a vinculo* may be granted judicially for adultery. In some of them(*l*) the jurisdiction of the Courts as to absolute divorces for causes subsequent to the marriage, is confined to the single case of adultery; but in the residue of the states, intolerable ill usage, or wilful desertion, or unheard of absence, or some of them, will authorize a decree for a divorce *a vinculo*, under different modifications and restrictions.(*m*)

*Observations on the Inexpediency of allowing unlimited Right of Divorce.*—The general advantages of indissolubility, as opposed to an unlimited right of divorce, are elegantly and clearly demonstrated by Hume in his Essay of Polygamy and Divorces, where he observes, "If it be true, on the one hand, that the heart of man naturally delights in liberty, and hates every thing to which it is confined; it is [ \*370 ] also true, on the other, that the heart of man naturally submits to necessity and soon loses an inclination, when there appears an absolute impossibility of gratifying it. Perhaps it will be said that these principles of human nature are contradictory: but what is man but a heap of contradictions! Though it is remarkable, that where principles are, after this manner, contrary in their operation, they do not always destroy each other; but the one or the other may predominate on any particular occasion, according as circumstances are more or less favourable to it. For instance, love is a restless and impatient passion, full of caprices and variations, arising in a moment from a feature, from an air, from nothing, and suddenly extinguishing after the same manner. But friendship is a calm and sedate affection, conducted by reason and cemented by habit, springing from long acquaintance and mutual obligations, without jealousies or fears, and without those feverish fits of heat and cold which cause such an agreeable torment in the amorous passion. So sober an affection, therefore, as friendship, rather thrives under constraint, and never rises to such a height as when any strong interest or necessity binds two persons together, and gives them some common object of pursuit. We need not, therefore, be afraid of drawing the marriage knot, which chiefly subsists by friendship, the closest possible. The amity between the persons, where it is solid and sincere, will rather gain by it; and where it is wavering and uncertain, this is the best expedient for fixing it. How many frivolous quarrels and disgusts are there, which people of common prudence endeavour to forget, when they lie under the necessity of pass-

(*k*) Delaware, Maryland, Virginia, South-Carolina, Georgia, Mississippi, and Louisiana.

(*l*) Maine, Massachusetts, New York,

North Carolina, and Illinois.

(*m*) 2 Kent's Comm. 88. As to New York, see *ibid.* pp. 82, 83.

ing their lives together ; but which would soon be inflamed into the most deadly hatred were they pursued to the utmost, under the prospect of an easy separation. We must consider that nothing is more dangerous than to unite two persons so closely in all their interests and concerns as man and wife, without rendering the union entire and total. The least possibility of a separate interest must be the source of endless quarrels and suspicions. The wife, not secure of her establishment, will still be driving some separate end or project : and the husband's selfishness, being accompanied with more power, may be still more dangerous."

\*Lord Stowell said, "In many cases, if it were a question of humanity simply, which confined its views merely [ \*371 ] to the happiness of the parties concerned, it would be a question easily decided upon first impressions. Every body must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness ; but the law of England will not allow the operations of such reasons. That law has said that married persons shall not be *legally* separated upon the mere disinclination of one or both parties to cohabit together. The disinclination must be founded upon reasons which the law approves. The law in this respect acts with wisdom and humanity, with that true wisdom, and that real humanity that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off ; they become good husbands and good wives, from the necessity of remaining husbands and wives ; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort ; with attention to their common offspring, and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."(n) The same learned judge also observed, "If two persons have pledged themselves at the altar of God to spend their lives together, for purposes \*that reach much beyond themselves, it is a [ \*372 ] doctrine to which the morality of the law gives no countenance, that they may by private contract dissolve the bands of this solemn tie, and throw themselves upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife.

(n) *Evans v. Evans*, 1 Hagg. Cons. R. 36, 37.



"There are, undoubtedly, cases for which a separation is provided; but it must be lawfully decreed by public authority, and for reasons which the public wisdom approves. Mere turbulence of temper, petulance of manners, infirmity of body or mind, are not numbered amongst these causes. When they occur, their effects are to be subdued by management if possible, or submitted to with patience; for the engagement was *to take for better for worse*; and painful as the performance of this duty may be, painful as it certainly is in many instances, which exhibits a great deal of the misery that clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance." (o)

Milton, in his celebrated work on this subject (p), laid down and forcibly argued in favour of the proposition: "That indisposition, unfitness, or contrariety of mind, arising from a cause in nature unchangeable, hindering, and ever likely to hinder, the main benefits of conjugal society, which are solace and peace; is a greater reason of divorce than natural frigidity, especially if there be no children, and that there be mutual consent."

Dr. Symmons, perhaps the most impartial biographer of Milton, says, "On the subject of divorce he makes out a strong case, and fights with arguments which cannot be easily repelled. The whole context of the Holy Scriptures, the laws of the first Christian emperors, the opinions of some of the most eminent reformers, and a projected statute of Edward the Sixth, are adduced by him for the purpose of demonstrating that by the laws of God, and by the inferences of the most virtuous and enlightened men, the power of divorce ought not to be rigidly restricted to those causes, which [ \*373 ] \*render the nuptial state unfruitful, or which taint it with a spurious offspring. Regarding mutual support as the principal object of this union, he contends that whatever defrauds it of these ends, essentially vitiates the contract, and must necessarily justify its dissolution. Though his arguments failed, and indeed they could not reasonably hope to produce general conviction, their effect was far from inconsiderable; and a party distinguished by the name of Miltonists, attested the power of his pen, and gave consequence to his pleading for divorce. The legislature, however, coinciding evidently with a large majority of the nation, seem to have considered the evil resulting from the indissolubleness of marriage as not to be weighed against the greater good; and their wisdom permitted the abilities of Milton to be exerted in vain against that condition of the contract which provided the most effectually for the interest of the offspring, and which offered the best means of intimately blending the fortunes, the tempers, and the manners of the parents."

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#### SECT. II.—OF PARLIMENTARY DIVORCE.

Marriage is considered by the law of England an indissoluble con-

(o) *Evans v. Evans*, 1 Hagg. Cons. R. 119. See post sect. iv.

(p) *The Doctrine and Discipline of Divorce*, p. 23, ed. 1820.

tract; and there is only one case where it has been deemed proper to sanction a complete dissolution, and that is, where one of the parties has been guilty of adultery. This power of dissolution is not entrusted to any ordinary court of justice, but reserved to the legislature. The practice is to legislate for each particular case, and by a specific act of parliament to release the injured individual from the bond of matrimony.

The first case, in which any parliamentary divorce was applied for, was that of the Marquis of Northampton, who had obtained a divorce in the Ecclesiastical Court in the reign of Henry VIII.; (a) but the question arose, whether, in consequence of the Reformation, the latter divorce was *à vinculo matrimonii* as well as *a mensa et thoro*. The question was looked upon as so important, that a commission was appointed, consisting of Archbishop Cranmer and nine other \*divines, to inquire whether the lady of the Marquis of Northampton was still his wife. The marquis, without [ \*374 ] waiting for the decision of the commissioners, married again, alleging that the ecclesiastical divorce was good, and that making marriage indissoluble was founded only on the doctrine of the Church of Rome. Although the decision of the commission was in favour of the marriage, it was not thought safe to consider the divorce as perfect, without an act of parliament. Application was accordingly made to parliament, and an act obtained, but Queen Mary succeeding to the throne on the following year, it was set aside on the ground that the divorce had been unlawfully obtained. (b) In the beginning of Queen Elizabeth's reign, it was generally held that ecclesiastical divorces were valid, and such continued to be the law of the country until the end of her reign. It was then totally changed; and it was held that the Ecclesiastical Courts could not grant divorces *a vinculo matrimonii*. (c)

A divorce for adultery was anciently *a vinculo matrimonii*; (d) and therefore, in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again; but in *Foljumb's case*, anno 44 Eliz. in the Star Chamber, that opinion was changed, and Archbishop Bancroft, upon the advice of divines, held that adultery was only a cause of divorce *a mensa et thoro*. (e)

By the canon law, persons who are divorced for adultery or cruelty cannot marry again while their former husband or wife is living, because matrimony, once perfected, can only be dissolved by the death of one of the parties. (f) But that law permitted the adulterer, after the marriage was dissolved by the wife's death, to intermarry with the adulteress, except where the adulterer had contrived, or been accessory to, the death of the wife. (g)

The law of the Roman Catholic Church as to divorce

(a) See 2 Burnet's Hist. of Ref. 53, 54.

(b) 2 Burnet's Hist. Ref. 237. See 4 Reeves's Hist. of Law, 549.

(c) Parl. Debates, 3 June, 1830, vol. xxiv. N. S. 1260, 1261.

(d) Glan. 44; Bract. 92; 16th ed. 4, 45.

(e) 3 Salk. 138; 2 Burn's Eccl. Law, 503;

*Rye v. Fulcumbe*, Noy's R. 100; see 2 Clark & Finn. 553; *Powell v. Weeks*, Noy's R. 108.

(f) Godolp. Abr. 495, &c.

(g) Decretal, Lib. iv. tit. 7, ch. 6; Erak, Inst. Book i. tit. 6, s. 43.

[ \*375 ] \*seems to have remained in a fluctuating and uncertain state,(h) until the canons of the council of Trent, De sacramento matrimonii, were promulgated upon the 11th November, 1563, the seventh of which dogmatically settles the question for the adherents of the Church of Rome. The words are: "Si quis dixerit, ecclesiam errare, cum docuit et docet juxta evangelicam et apostolicam doctrinam propter adulterium alterius conjugum matrimonii vinculum non posse dissolvi, et utrumque, vel etiam innocentem, qui causam adulterio non dedit, non posse, altero conjugæ vivente, aliud matrimonium contrahere, mœcharique eum qui dimissa adultera, aliam duxerit, et eam quæ dimisso adultero alii nupserit, anathema sit. Si quis dixerit ecclesiam errare, cum ob multas causas separationem inter conjuges, quoad thorum, sed quoad cohabitationem, ad certum, incertumve tempus fieri posse decerni, anathema sit.(i)

The canons prohibiting second marriage probably originated in the popish doctrine of marriage being a sacrament, and in the avarice of the court of Rome to obtain money for dispensations.(k)

In the proposed reformation of the ecclesiastical laws in the time of Edward VI., a rule was laid down, from which it may be collected that the opinion of the most eminent divines and priests of that day was in favour of allowing a second marriage upon a divorce for adultery. "Cum alter conjux adulterii damnatus est, alteri licebat innocenti novum ad matrimonium (si volet) progredi. Nec enim usque adeo debet integra persona crimine alieno premi, cœlibatus ut invitè possit obtrudi, qua propter integra persona non habebitur [ \*376 ] \*adultera, si novo se matrimonio devinxerit, quoniam ipse causam adulterii Christus exceptit."(l) But whatever may have been the history of the change, it appears to be now settled that marriage between natives of England, who continue domiciled there, is indissoluble, except by authority of parliament.

One of the ecclesiastical canons of 1603,(m) a law still in force, imposes on the ecclesiastical judge the obligation of requiring, that in

(h) See the canons referred to in Ferg. R. 443—446.

(i) Concilii Trident. Canones et Decreta, sess. 24, can. 7, 8, p. 247, ed. 1615; see Paul's Hist. of the Council, 626; ante, p. 23. The doctrine of the canon law.—Nec illi nubere conceditur, vivo viro, à quo recessit, neque huic alteram ducere, vivæ uxore, quam dimisit. Placuit, ut, secundum Evangelicam et Apostolicam disciplinam, neque dimissus ab uxore, neque dimissa à marito alteri conjungantur; set ita maneant, aut sibi met recedant. Quod si contempserint, ad penitentiam redigantur; Giba. Cod. 536.—See 5 Spel. p. 153, c. 10; ibid. 70, c. 120.—Quoties autem matrimonium dissolvitur, si id fit ob utriusque, conjugis perpetuum, impedimentum, utrique, aliæ nuptiæ interdicendæ sunt; si vero ob alterius tantum impedimentum, illi interdicuntur, concessa non impedito licentia ad alias transeundi; Sanchez, Lib. vii. Disp. 93, No. 37; Godolph. Abr. 304.

(k) See Parl. Hist. vol. v. 1174; 2 Hallam's

Middle Ages, 293.

(l) Reformatio Legum—De Adulteriis et Devotiis, c. 5, p. 49. The Archbishop of Canterbury, on the trial of Queen Caroline, said he was bound to say that a divorce à vinculo matrimonii was consistent with the word of God. Hans. Parl. Deb. N. S. vol. iii. p. 1710. See ante, pp. 365, 366.

(m) The 107th canon is in these words:—"In all sentences pronounced only for divorce, and separation *à thero et mensa*, there shall be a caution and restraint inserted in the act of the said sentence, that the parties so separated shall live chastely and continently; neither shall they during each other's life, contract matrimony with any other person. And for the better observance of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same shall have given good and sufficient caution and security into the court, that they will not any way break or transgress the said restraint or prohibition.

all sentences of divorce *a mensa et thoro* bond shall be given by the parties so separated, that they shall not during the life of each other contract matrimony with any other person. It has been argued, that as the canon does not declare a second marriage void, the penalty only of the bond is forfeited.(n)

The first attempt to invoke the interference of the legislature after that canon did not occur till the year 1668, in the case of Lord Roos; yet even then, though at the distance of a hundred years from the Reformation, so strong was the opinion that human legislatures had nothing to do in such matters, that it was with the greatest difficulty the divorce bill was carried through the house of lords, and all the bishops but three voted against it.(o) In 1715 Bishop Fleetwood combated the same notions, which still existed in his time. Parliamentary divorce was for some time exclusively confined to the very highest classes, and granted to them only as a great favour, and under special consideration.(p) After the accession \*of the [ \*377 ] House of Hanover, a greater laxity was introduced, and a greater number of divorce bills was passed. From the year 1715 to the year 1775, a period of sixty years, sixty divorce bills were passed, and from 1775 to 1800, during a period of twenty-five years, there were seventy-four such bills passed; from 1800 up to June, 1836, between eighty and ninety such bills passed.(q)

It is understood that the expense of a common divorce bill, which has nothing peculiar in it, is between 600*l.* and 700*l.*; the middle and lower ranks of life are therefore for the most part excluded from resorting to this remedy.

*Standing Orders of the House of Lords as to Bills of Divorce.*—That no petition for any bill of divorce shall be presented to the House of Lords, (where such bill usually originates,) unless an official copy of the proceedings, and of a definite sentence of divorce *a mensa et thoro* in the ecclesiastical court, at the suit of a party desirous to present such petition, shall be delivered upon oath at the bar of that house at the same time. And that upon the second reading of any bill of divorce, the petitioner praying for the same do attend that house to be examined at the bar, if the house shall think fit, whether there has or has not been any collusion directly or indirectly, on his part, relative to any act of adultery that may have been committed by his wife, or whether there be any collusion directly or indirectly between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentence of divorce had in the ecclesiastical court at his suit, or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife; and also whether at the time of the adultery of which the petitioner complains, his wife was by deed, or otherwise by his consent, living separate and apart from him, and released by him, as far as in him lies,

(n) See Godol. Abr. 495.

(o) See Parliamentary Hist. vol. iv. p. 447.

(p) See proceedings on the Duke of Norfolk's divorce, 13 How. St. Tr. pp. 1283—1310. The marriage of the Earl of Maclesfield was dissolved by act of parliament,

without any previous divorce having been obtained in the ecclesiastical courts. See Protest, Lords' Journ. 1637, vol. xvi. p. 224.

(q) Dr. Phillimore, Parl. Debates, 3 June, 1830, vol. xxiv. p. 1262. See Parl. Hist. vol. xxiv. p. 305.

from her conjugal duty, or whether she was at the time of such adultery cohabiting \*with him, and under the protection and [ \*378 ] authority of him as her husband.(r) There is a subsequent order that no bill grounded on a petition to the house of lords to dissolve a marriage for the cause of adultery, and to enable the petitioner to marry again, shall be received by that house unless a provision be inserted in such bill, that it shall not be lawful for the person whose marriage with the petitioner shall be dissolved, to intermarry with any offending party on account of whose adultery with such person it shall be therein enacted that such marriage shall be so dissolved; provided that if at the time of exhibiting the said bill such offending party or parties shall be dead, such provision as aforesaid shall not be inserted in such bill.(s)

The house of lords, in matters of divorce, do not sit merely in a judicial capacity, tied down by certain rules, but as a legislative body, which has full power to act according to its own wisdom, so that their acts are not to be considered as mere forensic acts but as acts of the legislature.(t)

Whether a husband morose, severe, inattentive, or negligent, would be entitled to a special legislative interference dissolving the marriage, and enabling him to marry again, is quite a different question, and rests on different principles than those on which a divorce *a mensa et thoro* is granted.(u)

*Order of the House of Commons as to Divorce Bills.*—That before any bill of divorce for adultery do pass this house, evidence be given before the committee to whom the said bill shall be committed, that an action for damages has been brought in one of his majesty's courts of record at Westminster, or in any one of his majesty's courts of record in Dublin, against the persons supposed to have been guilty of adultery, and judgment for the plaintiff had thereupon; or sufficient cause be shown to the said committee why such action was not brought, or such judgment was not obtained.(v)

[ \*379 ] *\*Mode of proceeding on Divorce Bills.*—Divorce bills must originate in the house of lords by petition presented to the house, signed by the party applying for the divorce. With the petition is delivered upon oath at the bar of the house an official copy of the proceedings, and of a definitive sentence of divorce *a mensa et thoro* in the ecclesiastical court, at the suit of the party desirous of presenting his or her petition to the house. The allegations of the petition will of course depend upon the circumstances of the case. The following are usual. The marriage, with its date, the settlement on the occasion of the marriage, the cohabitation of the petitioner and his wife, and the issue of the marriage (if

(r) 27 March, 1798, Lords' Journ. vol. xii. p. 517; see Hans. Parl. Deb. vol. xxxiii. p. 1309.

(s) Lords' Journ. 2 May, 1809, vol. xlvii. p. 317; see the debate on this order in House of Commons, 1805, Parl. Deb. vol. xiv. pp. 612—615. The clause required by the above order is invariably struck out in the committee, Hans. Parl. Deb. vol. xxiii. N. S. p. 1365.

(t) 1 Hagg. Cons. R. 132.

(u) 3 Hagg. Eccl. R. 73.

(v) Journals of Commons, 30 June, 1801; Standing Orders of the House of Commons relating to Private Bills, ordered by the House of Commons to be printed, 15 Aug. 1838, p. 21. It was resolved by the House of Commons, 12 Feb. 1840, "that all divorce bills be referred, during the present session, to a select committee of nine members."

any), the detection of the criminal intercourse, action brought, and judgment recovered; the proceedings in the Consistory Court and definitive sentence of divorce from bed and board there obtained, together with the loss of the petitioner's comforts of matrimony and liability to have a spurious issue imposed upon him. The petition must be signed by the party suing for the divorce, unless the petitioner should be abroad at the outset of the proceedings, when he may appoint an attorney to sign the petition for him. When leave is given to bring in the bill, it may be presented and read a first time, and ordered to be read a second time the next day fortnight. And orders may be made for certain witnesses to attend the house on the reading.(x)

When the bill is appointed to be read a second time on a future day, the usual orders will be made, and may be procured, with an office copy of the bill from the parliament office. Copies of the orders, as well as a copy of the bill examined with the house copy, must be served on the party against whom the divorce is sued for.

The usual orders are that notice be affixed on the doors of the house of lords, that the lords be summoned, and that the petitioner may be heard by his counsel on the second reading to support the allegations of the bill; that, together \*with the examined copy of the [ \*380 ] bill, notice be given of the second reading to the party against whom the divorce is sued, and that he or she may be at liberty to be heard by counsel against the bill.

Where the party, upon whom the office copy of the petition, bill, &c., is ordered to be served, lives abroad or absconds or secretes himself to evade the service, application must be made to the house, praying that leaving a copy of the bill and order with the party's agent, or at his last usual place of abode, may be deemed good service. And on proof of the facts stated in such petition upon oath, at the bar of the house, the prayer will usually be granted. On the second reading of the bill, the attendance of the petitioner is required in order to his being examined at the bar, (if the house think fit,) according to the standing order of 1798.(x)

When a petition has been presented by the attorney of a person abroad, and the usual orders made for the attendance of the petitioner on this second reading, it will be necessary to present a petition, stating that the party suing for the divorce is resident abroad, and praying that his attendance may be dispensed with.

On the day appointed for the second reading, after proving the service of the office copy, and orders upon the party and agent, as the case may be, the bill will be read a second time, and counsel heard in support of it, and witnesses called to prove the state of the family, the act of adultery, and other allegations in the preamble of the bill. The marriage must be proved by the production of a copy of the register, and satisfactory proof be given of the identity of the parties. If the marriage was solemnized abroad, it must be shown by persons acquainted with the law and custom of the place to have been a

(x) 1 Dwaris on Stat. 360, 361.

(x) Ante, p. 377.

legal marriage according to the law of the place where it was celebrated.(y)

The settlement, if any is recited in the bill, will be proved by the subscribing witness. The definitive sentence of divorce, before delivered at the bar of the house, must now be proved and read.

[ \*381 ] \*Although there is no positive standing order of the house of lords requiring the party applying for the divorce to have previously obtained a verdict with damages in a court of law, in an action for criminal conversation, yet evidence of that fact is usually required for negating fraud and collusion. The fact of judgment having been recovered must be proved by the record of the court.

The bill is then committed, reported by the chairman of the house, with amendments (if any), and ordered to be engrossed. It is then read a third time, and transmitted to the commons. In the house of commons the bill is then read a first time the day it is brought from the lords. When three clear days have elapsed, it will be read a second time, and committed to a committee of the whole house, and the next day sennight is appointed for the house to resolve itself into a committee upon the bill. An order is at the same time made that it be an instruction to the committee, "that they hear counsel and examine witnesses both for and against the bill." The observations before made upon the service of the order and office copy of the house of lords are applicable to the service here, which must be personal, or made on the agent in the absence of the party, and with leave of the house. In a case where evidence had been given that the wife was out of the kingdom, it was ordered that the service of the order of the house for the second reading of the bill upon her mother, and leaving an attested copy of the engrossed bill, should be deemed good service upon the wife.(z) Counsel will be heard before the committee in support of the bill, as in the other house, and the like proofs will be required, except that the parol evidence cannot be given upon oath.(a) Evidence must be given conformable to the standing order of the house of commons already mentioned.(b)

But few divorce bills have passed in favour of injured females. Dr. Lushington said that he only remembered one, \*which [ \*382 ] took place in the year 1801, in which there was proof against the husband of an incestuous intercourse.(c) In this case it appeared that a virtuous woman had been driven from her husband's house by the crime on his part of a double and incestuous adultery with her sister, a married woman. The bill seems to have passed very much on the ground that no reconciliation between the husband and wife could be legally made. A similar case has since occurred, in which the wife obtained a divorce in parliament.(d) As the wife

(y) See ante, pp. 148—153.

(a) Lingham's Divorce, 1805. Commons' Journal, vol. ix. p. 429.

(b) I Dwarrie on Statutes, 360. 364; see Directional Instructions on passing Private Bills, p. 165—175.

(c) Ante, p. 378. After the committee have made their report, the bill may be read

a third time, when it is returned to the house of lords in the usual way.

(c) Hans. Parl. Deb. vol. xxv. p. 1387; Addison's Divorce Bill, Parl. Hist. vol. xxxv. 1429—1436.

(d) An act to dissolve the marriage of Mrs. Turton, and to enable her to marry again. 1 & 2 Will. 4.

cannot maintain an action against the person with whom her husband has committed adultery, no verdict of a jury is of course in these cases required.

The proof of a verdict at law may be dispensed with, where the circumstances are such that the adultery of the wife can be proved by satisfactory evidence, and where at the same time it is impossible for the husband to obtain a verdict in an action at law. The absence of a verdict may arise from a variety of circumstances; but it must not arise from the individual who comes for the assistance of the legislature to remedy his misfortune. The man guilty of criminal conversation may, by immediately quitting this country, and by remaining out of the jurisdiction of the courts, deprive the injured party of all means of obtaining a verdict. A verdict was dispensed with in the case of a naval officer, whose wife had been brought to bed of one child in his absence upon duty abroad, and upon his return was far advanced in her pregnancy with the second, and where he could not discover the father. So in another case, where a married woman had gone to France, was divorced there, and had married a Frenchman. It would also be dispensed with, if the adulterer should die before the husband could obtain a verdict. It has also been dispensed with in cases where the adulterer had avoided the process of the courts of this country by going to reside abroad.

The test of a verdict is thought by some not to be worth much, \*as it rarely elucidates the real facts of the [ \*283 ] case. In many instances the person who has committed the adultery, from a feeling of delicacy towards the wife, makes no defence; on other occasions both parties are anxious to obtain a divorce, and therefore nothing in the course of the trial comes out against the character of the husband.(e) Lord Wynford proposed a standing order to compel persons who applied for a divorce bill, to put upon the table before the second reading of such a bill, in all cases, the notes of the judge who presided at the trial of any action in the case of criminal conversation.(f)

The husband was held to be deprived of his right to a divorce in parliament, by a letter offering 200*l.* a year for the separate maintenance of his wife, and agreeing to articles of separation, and to give up the adulterous connexion.(g)

Articles of separation were held in the house of lords to form an insuperable bar to the special interposition of the legislature on an application for a divorce.(h)

A case is mentioned in which the husband obtained an act of parliament, by which the marriage was dissolved, although he and his wife were living separate, and (in effect had never cohabited) when the adultery in proof was committed by the wife. To compensate for this *ordinary* requisite (namely, the cohabitation at that time of the parties) to the passing such an act, it seems that the two houses examined witnesses to the wife's *ante-nuptial* incontinence. Dr.

(e) Hans. Parl. Deb. vol. xxiii. N. S. p. 1385.

(f) Hans. Parl. Deb. 3d Ser. vol. iv. p. 921.

(g) *Perry's Divorce*, House of Lords, 28th March, 1838.

(h) In *Esten's Divorce*, 1798, Hans. Parl. Deb. vol. xxxiii. p. 1305-1308.



Addams conceives this to be the *single* instance of their having done so. Such evidence, it may be added, has in *no* instance been received to assist in making out the husband's claim to a sentence of separation, by reason of his wife's adultery, in the spiritual court.(i)

A case was mentioned in the house of lords where the lady, an infant in law, was inveigled into a marriage by a regular conspiracy: and though the marriage had not been consummated, "it had been so solemnized as prevented the receiving of such evidence as would show informality in the proceedings before the ceremony. In this case the banns had been published seven miles from the residence of either party, but according to law this circumstance could not be received in evidence. Leave was given to bring in a bill to dissolve the marriage, but it does not appear to have passed.(j)

Several attempts have been made to alter the law upon this subject. In 1791 a bill was brought into the house of lords by the Duke of Devon, the preamble of which stated that it was a remedial bill, "passed necessarily by the scandalous frequency of divorce bills.(k) In 1804 the bishop of Llandaff, Dr. Barrington, who was afterwards bishop of Exeter, brought in a bill "for the more effectual discouragement in the crime of adultery;" and the preamble to his bill stated that the great frequency of applications for divorce made it so urgent necessary. Both these bills were passed through the house of lords, and sent down to the house of commons, where they were read a second time, but they were lost in a committee.(l) In 1806 Lord Castlereagh brought in a bill "for the more effectual prevention of the crime of adultery," containing two provisions, the one that it should be lawful for the offending parties to intermarry; the other that every bill of divorce should contain a clause to that effect. The bill passed the house of lords, but was rejected in the other house on the second reading.(m) In the year 1811 the subject was again the subject of much discussion on the motion of Mr. Brougham, praying him "to direct the commissioners appointed to inquire into the state of the ecclesiastical law in England and Wales, to take into their consideration the expediency of enabling persons to be divorced from the bonds of matrimony, in cases of adultery, by civil process in courts of competent jurisdiction." The motion was negatived by a large majority.(n) \*Opinions have frequently been expressed in the house of commons that it would be better to try such causes, and that it would be more advantageous to the public, as well as more creditable to parliament, if some tribunal were established to decide and determine all such cases cheaply and expeditiously.(p) Dr. Lushington

(i) *See* *the case of the Marquis of Epsom v. Perrin*, 10 Mod. 121. *See* also *the case of the Marquis of Epsom v. Perrin*, 10 Mod. 121. *See* also *the case of the Marquis of Epsom v. Perrin*, 10 Mod. 121. *See* also *the case of the Marquis of Epsom v. Perrin*, 10 Mod. 121.

(m) *Parl. Hist.* vol. xx. p. 592-601.

(n) *Parl. Hist.* vol. xxxv. p. 225-325.

(o) *Dr. Phillimore*, *Parl. Deb.* vol. xxiv. N. S. 1260-1293.

(p) *Hans. Parl. Deb.* vol. xxiv. N. S. p. 124.

expressed himself very strongly in favour of the marriage laws being placed upon some solid basis; that some regulations were laid down, a deviation from which would at once entitle the aggrieved party to a divorce, whether that party was of high or low degree, and whether male or female.(g)

A wish was expressed by some learned lords in the year 1796, that the subject of divorce for adultery were submitted by an enactment of the legislature to some regular judicial court, where the crime and the provocation to the crime would be carefully balanced, where the facts and circumstances would be investigated with the temper, the deliberation, and the caution that ought to accompany such an investigation.(r) On another occasion Lord Stowell is reported to have expressed his opinion, "that the law in this country was placed on a footing the most consistent with the general safety; he meant so far, that the legislature should keep the matter of divorce in its own hands, rather than leave it to subordinate courts. By the existing practice it was requisite, to entitle a husband to a divorce, not only to give proofs of the misconduct of the wife, but at the same time of his own good conduct. It was evident there might be shades of difference as to the conduct of the husband, so as to render the decision of the legislature a matter of discretion, which did not safely belong, and could not strictly be entrusted, to a court of justice, whose decisions were to be guided by strict rules of evidence and matters of fact."(s)

It seems probable that this matter will be the subject of discussion during the present session of parliament.(t)

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\*SECT. III.—OF ADULTERY.

[ \*386 ]

Adultery is that act by which the marriage bed of another is violated. It is an injury "*ad alterius thorum*," from which, or as some have rendered it *ulterius*, or short *adulter*, it has derived its name of *adulterium*, or adultery.(a)

The offence of adultery must be considered in every well-regulated society as a gross violation of the essential rules of morality. Lord Kaimes observes,(b) that "by adultery, mischief is done both externally and internally. Each sex is so constituted as to require strict fidelity and attachment in a mate. The breach of these duties is the greatest external harm that can befall them; it harms them also internally, by breaking their peace of mind."

Archdeacon Paley remarks,(c) "A new sufferer is introduced, the injured husband, who receives a wound in his sensibility and affections the most painful and incurable that human nature knows. In all other

(g) Hans. Parl. Deb. vol. xxiii. N. S. p. 11 Feb. 1840.  
1387.

(r) Lords Thurlow, Loughborough, and Grenville, debate on Shadwell's Divorce Bill, 1796, Woodf. Parl. Rep. vol. xi. 339.

(s) Parl. Hist. vol. xxv. p. 306, 307.

(t) See Debates in House of Commons,

(a) Tebbe's Essay on Adultery and Divorce, 6; Isydore's Etymol.

(b) Sketches, 4th vol.; see Brown's Philosophy of the Human Mind, Lecture 84.

(c) Moral and Political Philosophy, book iii. part iii. ch. 4.

respects, adultery, on the part of the man who solicits the chastity of a married woman, includes the crime of seduction, and is attended with the same mischief. The infidelity of the woman is aggravated by cruelty to her children, who are generally involved in their parent's shame, and always made unhappy by their quarrel."

In ancient times adultery was inquirable in tourns and leets,<sup>(d)</sup> and punished by fine and imprisonment; but at the present day this offence belongs to the ecclesiastical courts, and the temporal courts do not take any cognizance of it as a public wrong.

*Cognizance of Adultery belongs to Ecclesiastical Courts.*—The jurisdiction of the ecclesiastical courts in cases of adultery is recognised by the statute 13 Edw. I., called the statute *circumspecte agatis*; by which the judges are commanded to act circumspectly in not punishing the bishops and clergy for holding plea in courts Christian of such things as be merely \*spiritual, that is to say, [ \*387 ] of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like.

The statute 27 Geo. 3, c. 44, s. 2, provides that no suit shall be commenced in any ecclesiastical court for fornication or incontinence after the expiration of eight calendar months from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for fornication at any time after the parties offending shall have lawfully intermarried.

Several attempts, indeed, have been made by the legislature to bring this offence within the pale of criminal jurisdiction; but they have, for the most part, been wholly ineffectual. During the time of the commonwealth, in the year 1650, when, as Blackstone justly remarks,<sup>(o)</sup> the ruling powers found it for their interest to put on the semblance of very extraordinary strictness and purity of morals, adultery was made a capital crime.<sup>(e)</sup> But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour; adultery, therefore, at the present day, as far as respects the temporal courts, is considered merely as a civil injury; and the only remedy which the law affords is an action, whereby the husband may recover against the adulterer a compensation in damages, for the loss of the society, comforts, and assistance of his wife, in consequence of the adultery.

*Actions for Criminal Conversation.*—The right to maintain a civil action against an adulterer belongs only to the husband. In order to enable the husband to maintain this action, it is essentially necessary that the husband should present himself in court with clean hands, as has been said, that is, without any imputation of having courted his own dishonour, or having been instrumental to his own disgrace; for if it can be shown that the plaintiff consented to the adulterous intercourse, or that he had suffered his wife to live in a state of prostitution, by which the plaintiff was drawn into the criminal connexion, the plaintiff

(d) 3 Inst. 206; See Ayliffe's Parer. 52. As to ancient punishments annexed to adultery in England, See Tebbs on Divorce, 188-201.

(o) 4 Bl. Comm. p. 64.

(e) See Scobell's Acts, part iii. p. 121, fol. ed.; see 7 Carr. & P. 200, 201; 1 Selw. N. P. 9 n.

cannot in such a case maintain this action. \**"If such a man were allowed to recover a verdict,"* said Lord Ken- [ \*388 ] yon, "the very source and first principles of justice would be contaminated." The circumstances in extenuation to lower the amount of damages will vary with every varying case. Proof of the wife's tainted character, as that she had been before a prostitute, or eloped with another; or proof of her being a woman of notoriously bad character, and that she made the first advances of a criminal nature to the defendant; or proof of the husband's profligate habits, and his criminal connection with other women, or that he felt no affection for his wife, turning her out of his house, and refusing to maintain her, before the intercourse with the defendant; or that he connived at the indecent familiarities of the defendant, and showed the utmost indifference about her reputation and character; these are some of the many circumstances which manifestly ought to have a very considerable effect with the jury in reducing the amount of damages.(f)

Proof of a settlement and provision for the children has been considered as evidence in aggravation of damages.(g) But in a recent case, evidence as to the defendant's property was rejected by Alderson, B., as improper, on the ground that a plaintiff is entitled to so much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the cause.(h)

If the husband be himself privy to the act of adultery complained of, he cannot maintain an action for criminal conversation.(i) The plaintiff will be entitled to a verdict, unless he has been in some degree party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society.(k) When connivance at the wife's elopement is imputed to the husband, he may call witnesses to prove the representation made by her to him of the place to \*which [ \*389 ] she was going previous to her elopement.(l) If a married man neglects the society of his wife, and openly lives with other women, in the apparent practice of adultery, he cannot maintain this action.(m) But it was afterwards held, that the misconduct, neglect, or infidelity of the husband, could never be set up as a defence for the adultery of the wife, but only goes in mitigation of damages.(n) It is no bar to an action against a person for criminal conversation with the plaintiff's wife, that the plaintiff had brought another action of the same kind, against another person, and having obtained verdict and judgment, had charged the latter in execution, although the cause of action in both suits accrued during the same period.(o) The action is not barred by the plaintiff's allowing the defendant to remain in

(f) See 2 Phillips on Ev. 204.

(g) Bull. N. P. 27.

(h) *James v. Biddington*, 6 Carr. & P. 589.

(i) *Worsley v. Bisset*, Bull. N. P. 27; *Foley v. Lord Peterborough*, cited 2 T. R. 166.

(k) *Winter v. Henn*, 4 Carr. & P. 494.

(l) *Hoare v. Allen*, 3 Esp. 276.

(m) *Wyndham v. Lord Wycombe*, 4 Esp. 16; *Sturt v. Marquis of Blandford*, cited ib.

(n) *Bromley v. Wallace*, 4 Esp. 237.

(o) *Gregson v. M. Tuggart*, 1 Camp. 415.

his house after a suspicion of his wife's fidelity had been intimated to him.(p)

It is now clearly settled, that if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even of loose and improper conduct, not amounting to consent, it only goes in reduction of damages.(q) Lord Kenyon went further, and ruled that the husband suffering a connexion between his wife and other men, was equally a bar to the action, as if he had permitted the defendant to be connected with her.(r) But if the wife be a prostitute, and the husband not privy to it, it only goes in mitigation of damages.(s) Proof is admissible in mitigation of damages that the wife had before eloped with others; that her husband had turned her out of doors, and refused to maintain her; that he had kept company with other women; and that he was acquainted with and consented to the defendant's familiarity with her.(t) In this action, it is not matter of defence, but only goes in mitigation of damages, that [ \*390 ] the \*plaintiff married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered her to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.(u)

The gist of actions of this sort is the loss to the husband of the comfort and society of his wife, which is always inserted in declarations of this kind as a material and substantial allegation. And therefore, a husband, who voluntarily relinquishes the comfort and society of his wife by consenting to a separation from her, cannot maintain an action for criminal conversation.(x) It is otherwise in the case of a temporary separation, where the husband has not given up all claim to be derived from the comfort and society of his wife.

Thus, where the husband and wife entered into a deed with trustees, whereby the husband covenanted with the trustees, to whom certain annuities were transferred, one payable to his wife absolutely, and another for so long time as she should live with her husband, that they should apply certain annuities to the separate use of the wife in case she should live apart from him, with the approbation of the trustees; and he also covenanted, in case of future differences, to permit the wife to live separate from him, if she should on that account find it necessary; and the deed also contained a clause, that in case of separation with the approbation of the trustees, certain of the children should live with and be educated by the wife for a certain period, and that she might visit the others at his house, especially when ill, so as to require the attention of a mother: such a deed was held not to preclude the husband from maintaining an action for adultery, committed while the wife was in fact living apart from him, whether the separation were with or without the approbation of the trustees,

(p) *Moley v. Lord Peterborough*, 4 Dougl.

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(q) *Duherly v. Gunning*, 4 T. R. 657.

(r) *Judges v. Windham, Peake*, N. P. C.

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(s) *Howard v. Burtenwood*, 1 Solw. N. P.

6 ad.

(t) *Gibber v. Sloper, and Roberts v. Marlston*, Bull. N. P. 27.

(u) *Calcraft v. Earl Harborough*, 4 C. & P. 499.

(x) *Weeden v. Timbrell*, 5 T. R. 357; 1 Esp. 16.

the case not being within the principle of *Weedon v. Timbrell*, even allowing that case to be the law to the extent there decided.(y) In *Warrender v. Warrender*,(z) Lord Brougham said, that the legal presumption of the cohabitation of husband \*and wife had [ \*391 ] been carried so far in the common law courts, "that the most formal separation can only be given in evidence in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society."

An action for damages may be brought in this country for adultery committed abroad; that circumstance cannot have any effect even in the mitigation of damages.(a)

The statute of limitations, 21 Jac. 1, c. 16, s. 3, may be pleaded in bar of this action, but the gist of the action being the injury sustained by the husband in consequence of the adultery, the proper plea under that statute is, not guilty within six years.(b) But where the statute of limitations is pleaded, the plaintiff may give evidence of acts of adultery which have taken place more than six years since, with a view of showing the nature of the connexion subsisting between the parties within the six years.(c)

*Evidence of terms upon which parties lived.*—The manner in which the husband and wife conduct themselves towards each other when together is admissible evidence; it follows, therefore, that letters, which in absence afford the only means of showing their manner of conducting themselves towards each other, are also admissible. The letters of the wife to her husband and others, before the adulterous intercourse, are admissible in evidence to show the state of the wife's feelings, although they may also state a fact, which would not strictly be evidence.(d) Letters written by the wife to the husband (while living apart from each other,) proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence without showing distinctly the cause of their living apart.(e) Proof that a letter produced corresponds as to its contents with a letter which the wife wrote to her husband, and which she read over to the witness, is sufficient to warrant the reception \*of the letter in evi- [ \*392 ] dence.(f) The judgment which a witness forms from the conduct and expressions of the wife to her husband whilst she lives apart from him, as to her affection for him, is evidence.(g) A letter written by the woman previous to her connexion with the defendant is admissible in mitigation of damages.(h) Where the husband and wife necessarily, from their situation in life, live separate, and the wife commits adultery, letters written by her during their separation, but before any suspicion of misconduct in the wife, are

(y) *Chambers v. Cusfield*, 6 East, 244.

Tr. 927. 945.

(z) 2 Clark & Finn. 527.

(d) *Willis v. Bernard*, 8 Bing. 376; 1 M.

(a) Per Lord Lyndhurst, 2 Clark & Finn. 562.

& Scott, 584; 5 C. & P. 342.

(b) *Coke v. Sayer*, Barr. 753; Bull. N. P. 26; 6 East, 388; *Macfadyen v. Olivant*, 6 East, 387; see *Woodward v. Walton*, 2 Bos. & P. N. R. 476; *Ditcham v. Bond*, 2 Maule & S. 436.

(e) *Trelawney v. Coleman*, 1 B. & Ald. 90; 2 Stark. 191.

(f) *Trelawney v. Coleman*, 1 B. & Ald. 90; 2 Stark. 191.

(g) Ibid.

(h) *Elsem v. Faucett*, 2 Esp. 562.

(c) *Duke of Norfolk's case*, 12 How. St.

admissible evidence to show that the husband and wife lived in a state of connubial affection previous to the adultery; but the time when the letters were written must be shown.(i) If to rebut the presumption that a wife left her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms, are offered in evidence, it must be proved at what time they were written, or they are not admissible in evidence; and the dates of them are not sufficient proof of the times at which they were written.(k) Letters written by the wife to her husband are not receivable in evidence in an action for criminal conversation, if written at a time when at least an attempt at adultery had been made by the defendant; but a draft, in the defendant's handwriting, of a letter written by the wife, in answer to a letter to the wife, is receivable in evidence, as well as the letter to the wife.(l) In an action for criminal conversation, where the adultery was committed on board a ship during a voyage, a witness may be asked on the part of the plaintiff, whether the wife did not keep a journal, and whether she stated for what purpose she kept it.(m)

*New Trial.*—It was formerly supposed that in this action a new trial would not be granted for excessive damages;(n) but Lord Ellenborough, C. J., said, that "if it appeared to them from the amount of the damages given, as compared with the facts of the case laid before the [ \*393 ] jury, that the jury \*must have acted under the influence either of undue motives, or some gross error or misconception on the subject, the court would think it their duty to submit the question to the consideration of a second jury."(o)

A jury having found a verdict for the defendant in an action for criminal conversation, the court granted a new trial on the ground that the verdict was much against the weight of evidence, notwithstanding there was some evidence for the defendant.(p) The court will not reduce the damages in an action for criminal conversation, unless a very strong case be made out.(q)

*Costs.*—Although the damages recovered are under forty shillings, yet the plaintiff will be entitled to full costs,(r) this action not being within the statute 22 & 33 Car. 2, c. 9. The stat. 22 & 23 Car. 2, c. 9, is repealed so far as it relates to costs in personal actions, by 3 & 4 Vict. c. 24, s. 1. The second section of the latter act enacts, that costs shall not be recovered in any action of trespass, or of trespass on the case, where the damages recovered are less than forty shillings, unless upon the judge's certificate. In actions for criminal conversation, the plaintiff may sue either in trespass for the direct injury, or in case for the consequential damage.(u)

*Evidence of Marriage.*—In actions for criminal conversation, proof must be given of a marriage in fact; the presumption of a marriage arising from evidence of cohabitation, general reputation, and reception by their friends, is not alone sufficient. The plaintiff must prove

(i) *Edwards v. Crock*, 4 Esp. 39.

(k) *Huntston v. Smith*, 2 C. & P. 24; 3 Bing. 127; 10 Moore, 482.

(l) *Willon v. Webster*, 7 C. & P. 198.

(m) *Jones v. Thompson*, 6 C. & P. 415.

(n) *Wilford v. Berkeley*, 1 Burr. 609.

(o) *Chambers v. Caulfield*, 6 East, 256.

(p) *Mellin v. Taylor*, 3 Bing. N. S. 109.

Upon the new trial the plaintiff had a verdict with 1000*l.* damages.

(q) *Wyatt v. Rochfort*, 2 Jurist, 13.

(r) *Batchelor v. Bigg*, 3 Wils. 319; 2 Bl. R. 364; see *Coke v. Sayer*, 2 Wils. 85.

(u) *Chamberlain v. Hazelwood*, 5 Mees. & W. 515; 7 Dowd. P. C. 816.

the marriage ceremony to have been performed either by the testimony of some witness who was present at the marriage, or by the production of the register, or of an examined copy thereof. But if the register be lost, and the parson and clerk are dead, it seems that the fact may be proved by other strong evidence, as that of a person present at the wedding dinner.(s) The identity of the parties frequently does not appear either to the minister who performed the ceremony, or to the attesting witnesses; therefore the identity, so as to connect the marriage in fact with the person in question in the action, may be proved by other persons or circumstances.(t) Where an actual marriage has been proved by a copy of the register, the minister, clerk, or subscribing witnesses, are not the only competent witnesses to prove the identity of the persons married.(u) Although the defendant's general admission of the marriage is insufficient,(x) \*there seems to be no doubt but a distinct [ \*394 ] and solemn recognition of the marriage made by the defendant is evidence as against him of that fact.(y)

*Proof of the Fact of Adultery.*—The evidence of this fact which is usually circumstantial, must be sufficient to satisfy the jury that the adulterous intercourse has actually taken place. The proofs usually adduced are the elopement of the parties; their passing as man and wife at the inn, of the season, frequency and privacy of their meetings, and of all other circumstances attending their intercourse, and indicating the nature of it.(z)

*Prisoner in Custody for Damages in Action of Crim. Con.*—By stat. 1 & 2 Vict. c. 110, s. 78, a prisoner, imprisoned for damages recovered in an action for criminal conversation, is liable to be detained for any period not exceeding two years. But a prisoner in execution for damages under 20*l.* in such an action, is entitled to his discharge at the end of a twelvemonth, under 48 Geo. 3, c. 123.(a) The stat. 1 & 2 Vict. c. 110, s. 41, does not operate to prevent a prisoner from being discharged out of custody under 48 Geo. 3, c. 123, s. 1, but applies only to cases of supersedeas at common law.(b)

In cases where an insolvent is opposed, on account of damages recovered by the plaintiff in an action for criminal conversation with the wife of the plaintiff, the opposition to the discharge of the insolvent is made by the production of the records, or of examined copies of the judgments, and in general the court will not allow the merits of the case to be gone into. The finding of the jury determines the character and extent of the injury, and the court, in forming its judgment on the length of time for which the insolvent shall continue in custody, at the suit of the complaining creditor, will be regulated by the amount of damages.

Where judgment, in an action for criminal conversation, \*was allowed to go by default, and the damages [ \*395 ] assessed, upon a writ of inquiry, at 700*l.*, and the insolvent taken in

(s) *Morris v. Miller*, 1 Bl. R. 632.

(t) *Hemmings v. Smith*, 4 Doug. 33.

(u) *Birt v. Barlow*, 1 Dougl. 171.

(x) *Morris v. Miller*, 4 Hurr. 2057.

(y) See *Rigg v. Curgensvern*, 2 Wils. 399; 3 Stark. Ev. 251; 2 Phill. Ev. 202.

(z) See Stark. on Ev. 440. As to evidence of adultery, see post, p. 405—410.

(a) *Goodfellow v. Robings*, 3 Bing. N. S. 1. See *Winter v. Elliott*, 1 Ad. & Ell. 24;

3 Nev. & M. 315.

(b) *Chew v. Lye*, 5 Mees. & Wels. 388.



execution, the court refused to hear evidence on the part of the insolvent, affecting the merits of the case, the finding of the jury being conclusive. But if the opposing creditor, in the examination of the insolvent, enter upon the merits of the case, the insolvent will be entitled to state upon his part all circumstances of mitigation.(c)

*Adultery of either Party equally an offence in Law.*—The offence of adultery, although distinguishable in its consequences with reference to society, depending upon the sex of the offender, and so practically considered to be by the laws of many countries, is, according to the canon law, which governs the ecclesiastical courts of England, equally an offence, whether committed by the husband or by the wife, either of whom has an equal right of proceeding for a remedy.

Montesquieu,(d) Pothier,(e) and Dr. Taylor,(f) all insist that the cases of husband and wife ought to be distinguished, and that the violation of the marriage vow on the part of the wife is the most mischievous, and the prosecution ought to be confined to the offence on her part.

Lord Eldon said, "It was to be considered that adultery committed by a wife, and adultery committed by her husband, were widely different in their consequences. The adultery of the wife might impose a spurious issue upon the husband, which he might be called upon to dedicate a part of his fortune to educate and provide for; whereas no such injustice could result to his wife from the adultery of a married man; and in many cases, not only a reconciliation might be brought about, but it became the especial duty of a wife to forgive her husband's misconduct, from motives of tenderness and concern to the interests of his innocent children."(g)

*What Persons may institute suits for Adultery.*—All persons, whether Christians or Jews, who stand in the relation of husband and wife, in any way that the law allows, as by a foreign marriage, or by a [ \*396 ] domestic marriage, not contrary to law, have a claim to relief on the violation of any matrimonial duty.(h)

In a suit for divorce by reason of cruelty and adultery brought by the wife against the husband, where the wife's grandfather was appointed her guardian *ad litem* on her mother's renunciation, which was not shown to be by her husband's consent, and he prayed to be dismissed on the ground of the incompetency of the guardian to institute proceedings, Lord Stowell would not enter into the question, whether the husband could dispute the effect of the above appointment, since it was enough if a third person could not take advantage of such an objection; for, said his lordship, the court finds a guardian apparently appointed with sufficient regularity, and unless the appointment is shown by presumptive proof to have been invalid, the court will presume the person properly qualified to receive it.(i) His lordship had no doubt of the competency of the person instituting the suit.

(c) Cooke's Insolvent Debtors' Pr. 221—223, 2d ed.

(d) L'Esprit des Loix.

(e) Traité du Contrat de Mariage, No. 516.

(f) Elements of Civil Law, 254.

(g) Parl. Hist. vol. xxxv. p. 1433.

(h) D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. R. 773, suppl.

(i) Berham v. Berham, 1 Hagg. Cons. R. 5, 6.

The court ordered the father to appear as curator *ad litem* of his son, a minor, who was cited to answer to his wife in a suit of divorce, by reason of cruelty and adultery.(k) The father having refused the office, was appointed against his will, and sentence of excommunication was passed against him on motion to absolve it; Lord Eldon could not see the principle upon which, with regard to a son *foris familiaris*, the father could be compelled to be guardian *ad litem*; and an action was afterwards brought for unlawfully excommunicating the father.(l)

The committee of a lunatic may institute proceedings in the ecclesiastical court, without obtaining the sanction of the lord chancellor, against the wife of the lunatic for adultery. In a further proceeding in the case last cited, Lord Stowell said, "that he was not aware of any case which had occurred precisely similar; it must therefore be decided, not on express authority, but on principle, or rules of analogy drawn from other authorities, which are clear and undisputed. The question \*resolves itself into two points; first, whether a [ \*397 ] lunatic is put out of the protection of the law; and, secondly, if he is not, whether there is any other mode in which redress can be obtained. On the first, there can be no doubt: and it never can be asserted that the wives of lunatics should be universally released from the duties of their marriage vow. It would be an imputation on the law of this country to suppose that it had not provided some remedy against such a mischief. Then in what way is this protection to be afforded? It must be in the same way as in other cases, by the committee. The lunatic cannot personally institute the suit, and therefore he must by his ordinary guardian. It is true, as has been observed, that in complicated matters, the committee ordinarily applies to the lord chancellor for authority to sue, but the learned judge did not know that it would be advisable to promote a suit before the lord chancellor, preparatory to proceedings of this nature. The ecclesiastical court has no authority over the committee, to require that he should make an application to it. It is bound to receive his plea when brought as matter of right. On these grounds, and upon principle, the powers of the committee must be upheld, to protect the lunatic from the greatest of all possible injuries.(m)

The right to sue for a divorce, on the ground of adultery, is matter purely of private right to the parties, the exercise of which is not enjoined, but merely permitted.(n) In a cause of divorce where the alleged marriage is deemed to be valid, it seems probable that the court may permit third parties, who have estates expectant inter alia upon the issue of such marriage being illegitimate, and who consequently are interested in the question of its validity, to be cited, "to see proceedings" in the cause, so far as relates to the marriage.(o)

*Absence of Consummation.*—The absence of consummation of the marriage is not a bar to a divorce where it appeared that the woman

(k) *Beauraine v. Beauraine*, 1 Hagg. 170, 171.

Cons. R. 493. See Oughton, tit. 20.

(n) Ferg. R. 96, 97; L'Esprit des Loix,

(l) *Boraine's case*, 15 Ves. 346; *Boraine* lib. 26, ch. 3.

v. Sir W. Scott, 3 Campb. 368.

(o) *Montague v. Montague*, 2 Addams's

(m) *Parnell v. Parnell*, 3 Hagg. Cons. R. R. 372.

would not allow consummation, and immediately eloped with the adulterer.(p)

[ \*398 ] It is no bar or objection to a suit that the adultery was \*committed not in this country but in a foreign country, the law either in England or in Scotland makes no distinction in respect of the place of the commission of the offence.(q)

*Mode of Proceeding.*—A citation or decree issues at the suit of the party complaining, calling upon the defendant to appear and show cause why the plaintiff should not be divorced from bed, board and mutual cohabitation, by reason of cruelty or adultery, as the case may be. The service of the process being effected, and an appearance being given, a libel is brought in, and on its admission by the judge, and the averments being denied by the defendant, witnesses are examined and publication of their evidence, and if there be no allegation excepting to them or any of their testimony, the judge proceeds to hear the cause and give sentence. During the proceedings, the defendant can give in a responsive allegation recriminatory, and presuming both parties be proved to have been guilty of adultery, the judge will dismiss the suit.

The libel in this case, pleads the courtship and marriage of the parties, their cohabiting and passing as man and wife, the birth of children, (if any,) the various acts of adultery, when, where, and with whom committed, or if cruelty, specifying the same, and when and where; and also shows the jurisdiction of the court, and concludes by praying the judge to pronounce the party to be divorced from bed, board, and mutual cohabitation.

In cases where proceedings have been previously had at common law, and a judgment obtained against an adulterer, that fact is pleaded, and a certified copy of the judgment is annexed.(r)

*Adultery must be alleged in Libel.*—The libel must plead the conclusion of adultery, because unless it is pleaded, *non constat* that it may not be an action for mere solicitation of chastity. But if the party does aver it, and he proves only proximate acts, he proves unquestionably the whole of his averment in the libel. It is the duty of the court to draw such inference as the proximate acts proved by witnesses unavoidably lead to.(s) The libel charging adultery ought

[ \*399 ] to set forth some \*certain and definite time, viz. the year and month wherein the crime of adultery was said to be committed, for without such specification of time the libel is not valid in law, and the court will not proceed in the cause even though the party accused should not oppose the proceeding.(t) Where the parties are living separate the commencement of the acquaintance with the alleged paramour, and of the suspicions of the persons under whose care the wife was, should be set forth circumstantially. Where the wife, engaged in an improper connection with the paramour, was obliged to retire, the whole transaction may be pleaded. Where a letter is pleaded to be in the possession of the adverse party, the contents may be set forth at length, leaving the other party if she pleases

(p) *Patrick v. Patrick*, 3 Phill. R. 496.

(q) *Warrender v. Warrender*, 2 Clark. & Finl. 504.

(r) 2 Chitty, Pr. L. 489, 490.

(s) 1 Hagg. Con. R. 278.

(t) *Ayliffe v. Fox*, 50.

to produce the letter.(u) In matrimonial suits the libel must contain all the facts that can by diligence be ascertained at the time, and subsequently, new facts only which are nearly conclusive of guilt can be pleaded.(x) But though the whole substantive case should be at once brought before the court, yet where it is clearly shown that the facts could not have been sooner pleaded, additional articles may be given in.(y) In suits for adultery the party is not bound to the contents of his original libel, but it has been constantly held that fresh acts of adultery may be pleaded supplementarily, and that a sentence may be obtained on facts not existing at the commencement of the suit.(z) In a suit for separation by reason of the wife's adultery, although publication has passed, the court, on an affidavit that material facts are newly discovered, may in its discretion, allow the cause to be opened for the purpose of pleading further adultery.(a) Adultery committed by either the husband or wife at any time before sentence, will bar a sentence of separation at the suit of the other party, or \*will compel the court to dismiss both parties, [ \*400 ] adultery being mutually or reciprocally charged in the cause; and courts must permit either of such parties to plead adultery against the other, in any stage of such a cause, whether before or after publication, and how long soever this may have passed, or the cause may have been depending, it being certified to have been pleaded within a reasonable time after coming to the proponent's knowledge.(b)

In a suit by a husband for divorce on the ground of adultery, if the wife's allegation responsive to the libel plead that adultery was committed by the husband, he may meet the same by a defensive plea, and then the wife may afterwards offer additional articles negating part of the husband's defensive allegation, and the latter will be admissible although a fourth allegation, because they may afford the court better means of arriving at a just conclusion.(c) It is perfectly well settled that cruelty cannot be pleaded by the wife in bar of a charge of adultery.(d) A libel pleading specific acts of adultery and cruelty can only be rejected in toto on one of two grounds:—1st, that the plea on the face of it shows a case impossible of proof; 2nd, that it evidently appears from the facts pleaded, that the party complaining has barred herself.(e) Where a libel pleaded facts, 1st, to establish the adultery of the wife; 2nd, to show that the husband had not forfeited his claim to relief by misconduct—the court directed parts to be reformed, on the several grounds of too great minuteness, hearsay, and pleading the contents of a letter not exhibited nor accounted for,

(u) *Croft v. Croft*, 3 Hagg. Eccl. R. 315—317.

(x) *Story v. Story*, 3 Hagg. Eccl. R. 738.

(y) *Moorsom v. Moorsom*, 3 Hagg. Eccl. R. 97.

(z) *Newton v. Newton*, Cons. 1781, cited in *Middleton v. Middleton*, 2 Hagg. Eccl. R. Suppl. 136; see *Webb v. Webb*, 1 Hagg. Eccl. R. 349.

(a) *Middleton v. Middleton*, 2 Hagg. Eccl. R. Suppl. 134; see *Hamerton v. Hamerton*, 2 Hagg. Eccl. R. 24. It is a known maxim

in the civil law *causa nunquam concluditur contra judicem*, Oughton, tit. 117. s. 3, n. "Quoad judicem," says Gail, "*nunquam in causa concluditur, et ideo ex officio conclusionem rescindere, ulterius.*"

(b) *Brisco v. Brisco*, 2 Add. R. 259.

(c) *Serjeant v. Serjeant*, Cons. Court, June 27, 1834, 2 Chitty's Pr. L. 462.

(d) *Harris v. Harris*, 2 Hagg. Eccl. R. 411.

(e) *Popkin v. Popkin*, 1 Hagg. Eccl. R. 765, Suppl.

and admitted the rest.(f) The libel in a suit for cruelty and adultery, disclosing the existence of a former suit between the same parties, partly on the same facts, and that such former suit was appealed, and in the superior court dismissed by consent before sentence, it was held that the inferior court could not determine as to the admissibility of such libel, the inhibition in the former suit not [ \*401 ] \*having been expressly relaxed.(g) The court is entitled to exercise a discretion as to what part of a libel may or may not be unnecessary, yet it is a discretion very considerably restricted. It cannot exclude substantial facts. If twenty facts of adultery were pleaded, though one might be sufficient to entitle the husband to his remedy, the court would hesitate before it struck out one of them. It cannot foresee to what extent the husband is in possession of evidence, nor in what particular instances the averments of the libel may be proved; and it would be extremely dangerous, and as it seems, going beyond all precedents, to strike out that which must be admitted to be a very material point towards enabling the court to arrive at a satisfactory conclusion on the case.(h) The wantonly pleading matter which has not been proved by the wife in a suit for adultery may affect part of the costs. Although the wife has an independent income she will be entitled to costs where she has established the case, notwithstanding the insufficiency of the husband's fortune.(i) In a cause for a divorce by reason of adultery, brought by the husband against the wife, where the parties had separated by agreement, the libel charged the woman with cohabiting in an adulterous intercourse, and also pleaded a *pretended* marriage with the adulterer, and exhibited a copy of the entry of such marriage. It was objected that this marriage being *bigamy* and a felonious act could not be pleaded in the ecclesiastical court. The court held the marriage, though amounting to a felony, if criminally prosecuted, would afford a strong presumption, and corroborate the other evidence that might be offered as to the charge of adultery, for if the parties had performed the ceremony of marriage in a church, and had since lived together ostensibly as man and wife, that fact so assisted by the subsequent cohabitation, was strong presumptive evidence of an adulterous intercourse, and was therefore proper to be pleaded.(j)

[ \*402 ] *\*Intenuptial Incontinence.*—The wife's incontinence in her single state cannot be pleaded in the first instance, by the husband in a suit for a separation *a mensa et thoro*, by reason of adultery against the wife.(k) It may possibly be a defence in a suit for restitution of conjugal rights,(l) in justification of the husband, where the wife sets up a plea of malicious desertion.

*Letters.*—Letters of the husband exhibited by the wife are evidence against him, and explanations therein contained of his conduct with respect to the matter charged, are to be taken into the court's consi-

(f) *Croft v. Croft*, 3 Hagg. Eccl. R. 310.

(g) *Smyth v. Smyth*, 4 Hagg. Eccl. R. 223—231.

(h) *Croft v. Croft*, 3 Hagg. Eccl. R. 321.

(i) *Mulleux v. Scilleux*, 1 Hagg. Cons. R. 370.

(j) *Nash v. Nash*, 1 Hagg. Cons. R. 140;

see *Bromley v. Bromley*, Ib. 141, n.: ante, p. 223—231.

(k) *Perrin v. Perrin*, 1 Addams R. 1; 2 Phill. 127; see 2 Addams, 306, n.; ante, 363; *Best v. Best*, 1 Addams, 411.

(l) 1 Hagg. Cons. R. 373.

deration, but other statements therein are not evidence for the husband, at least in debating the admissibility of the plea.(m) After publication, in a suit for separation for the husband's adultery, the court will not, in the first instance, delay the hearing, in order that the wife may counterplead her letters annexed to the husband's interrogatories, from which connivance *par delictum*, (neither pleaded) is to be inferred; but it seems that it will not ultimately allow her to be barred by reason of such letters, without affording her an opportunity of explaining them. The court would not before the hearing rescind the conclusion, in order to admit an allegation counterpleading letters annexed to the interrogatories, nor would it direct such letters to be disannexed; but it seems that if at the hearing the letters appear important, it will then allow the admissibility of the allegation to be debated.(n)

*Rescinding the Conclusion of the Cause.*—In a suit for separation by reason of the wife's adultery, the conclusion of the cause may be rescinded generally, if the court is of opinion, after argument, that adultery is not sufficiently proved.(o) So in a testamentary cause, the court, after hearing the argument and delivering its opinion of the insufficiency of the evidence, may rescind the conclusion, in order that the identity of the alleged testator may be pleaded [ \*403 ] and proved.(p) The \*conclusion of a cause was rescinded, [ \*403 ] to allow the production of proof of the testator's handwriting.(q) And in a suit for a seaman's wages, the judge may properly rescind the conclusion of the cause for the admission of further evidence.(r)

In suits for adultery, the conclusion of the cause has been rescinded in some cases, in order to prove identity where there had been proof given of guilt. In *Donellan v. Donellan*,(s) a criminal connection between a man and woman was proved: the circumstances established would have satisfied a court of common law, and were sufficient to impress any mind with a moral conviction of the guilt of the wife, but there was no proof of her identity; and the only question was, whether the woman in the lodgings was the party in the cause. In a suit for separation by reason of the wife's adultery, after the arguments of counsel are closed, and after the court has delivered its opinion that the evidence did not prove the charge of adultery, although it established against her a case of great inpropriety and culpability, it is a fit exercise of discretion to rescind the conclusion of the cause for the purpose of admitting an allegation pleading further matter to establish the wife's guilt.(t) Where no indecent familiarity, proximate act, or personal freedom (except two kisses,) and no circumstances inferring adultery are proved, letters from the alleged paramour, found in the wife's possession, but not necessarily implying the commission of adultery, will not support a sentence of separation by reason of her adultery; but if the evidence raises a suspicion that

(m) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 267. 415.

(n) *Turton v. Turton*, 3 Hagg. Eccl. R. 343. 346.

(o) *Donellan v. Donellan*, 2 Hagg. Eccl. R. Suppl. 144.

(p) *Cargill v. Spence*, 2 Hagg. Eccl. R. Suppl. 146; *Smith v. Smithson*, 2 Lee's R.

(q) *Shawnessy v. Allen*, 1 Lee's R. 9.

(r) *Henley v. Morrison*, 2 Hagg. Eccl. R.

Suppl. 147.

(s) 2 Hagg. Eccl. R. Suppl. 144.

(t) *Hamerton v. Hamerton*, 2 Hagg. Eccl.

R. 618.

an adulterous intercourse is carrying on between the parties accused, the court may, upon affidavits, rescind the conclusion, and allow the husband to give in an allegation.(u) On a suggestion that a charge of collusion and connivance, raised in argument on his own evidence, was a surprise on the husband, there being no counter plea or interrogatories, the court refused to rescind the conclusion, in order that [ \*404 ] letters might be pleaded, holding that \*the husband was bound to guard himself against suggestions arising not merely on the plea of the other party, but on his own evidence.(x) The court refused to rescind the conclusion of a cause of nullity of marriage, where the libel was not proved.(y) It seems doubtful whether the court has power to rescind the conclusion of a cause, after sentence, against the sense and consent of the party for whom it was given.(z)

*Proof of a valid Marriage.*—In suits by reason of adultery, the first point to be established is a valid marriage; for there can be no adultery if there is no marriage. The fact of the legality of the marriage may be contested; and if it be not, the form of the sentence in a suit for divorce by reason of adultery pronounces that there has been a true and lawful marriage as well as a violation of it.(a) Where in answer to a libel for adultery, the marriage is asserted to have been illegal, the preliminary question as to the legality or illegality of the marriage must be decided before the husband is put to the expense of examining witnesses on the libel.(b) Plea of a former marriage is a good ground for staying proceedings. The question of the former marriage must be determined previously to entering upon the question of adultery.(c) and if a previous marriage be established, it will bar the suit.(d)

*Separation not decreed for Misconduct short of Adultery.*—The court cannot separate on improper conduct short of actual adultery. The law does not require direct evidence of the very act committed at a specific time and place; but the court must be satisfied that actual adultery has been committed.(e) Where there is proof of indecent familiarity between the parties, or if the court is in any way satisfied that undue intimacy subsisted between them, then the court will much [ \*405 ] more easily draw the conclusion that where the facilities \*were so great, and the opportunity of access so easy, the crime of adultery might have been committed.(f)

*Evidence of Adultery.*—It will be proper in this place briefly to advert to the rules of evidence which are adopted and acted on in the ecclesiastical courts with respect to the fact of adultery having been committed. Adultery being an act of darkness and of great secrecy, can hardly be proved by any direct means; therefore in relation to the proof of adultery, by reason of such difficulty, it happens

(u) *Hamerton v. Hamerton*, 2 Hagg. Eccl. R. 8.

(x) *Cresse v. Cresse*, 3 Hagg. Eccl. R. 123.

(y) *Nokes v. Milward*, 2 Addams's R. 402.

(z) *Lawrence v. Maud*, 1 Addams's R. 481.

(a) *Guest v. Shipley*, 2 Hagg. Cons. R. 379.  
322; see *Ayliffe Parer* 50.

(b) *Mayhew v. Mayhew*, 2 Phill. R. 11.

(c) *Robins v. Wolseley*, 1 Lee's R. 616.

(d) 2 Lee, 476.

(e) *Hamerton v. Hamerton*, 2 Hagg. Eccl.

R. 14; *Riz v. Riz*, 3 Hagg. Eccl. R. 74.

(f) *Harris v. Harris*, 2 Hagg. Eccl. R.

that presumptive evidence alone is sufficient proof; and this presumptive proof is collected and inferred *ex actibus propinquis*, that is to say, from the proximity and nearness of the acts; and thus adultery may be proved by such inferences as are received and approved of either by law or nature.(g) In *Williams v. Williams*,(h) Lord Stowell said, "It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be, that there must be such proximate circumstances proved as by former decisions, or in their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed. The court will look with great satisfaction to the authority of established precedents; but where these fail, it must find its way as well as it can by its own reasoning on the particular circumstances of the case." The same learned judge also said, "It is a fundamental rule of evidence upon this subject, that it is not necessary to prove the direct fact of adultery, because if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them of a more obvious nature, and of more frequent occurrence, are to be \*found in the ancient books; at the same time it is impos- [ \*406 ] sible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason, and courts of justice would wander very much from their proper office, of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same. It is the consequence of this rule that it is not necessary to prove a fact of adultery in time and place; circumstances need not be so specially proved as to produce the conclusion that the fact of adultery was committed at that particular hour, or in that particular room; general cohabitation has been deemed enough, and acted upon repeatedly as sufficient

(g) Ayliffe, Parer. 44, 45.

(h) 1 Hagg. Cons. R. 299.



proof of the fact of adultery.(i) To prevent, however, the possibility of being misled by equivocal appearances, the court will always travel to the conclusion with every necessary caution; whilst on the other hand it will be careful not to suffer the object of the law to be eluded by any combination of parties to keep without the reach of direct and positive proof. If then proof of a specific act is not necessary, it is equally unnecessary that a confession, if there be one, should apply to a particular time and place. The confession, if general, would apply to all times and places at which it might [ \*407 ] appear probable, in proof, that the fact might have taken place. Another principle is equally clear, that confession alone cannot be received, so says the canon;(j) for without this restriction there would be no check upon the collusion and imposition that might be practised on the court.(k) But a confession may be received, accompanied by collateral evidence, which when taken together, form the strongest proof possible.(l)

The court will not in a clear case require a superabundance of proof; therefore if adultery continued many years, attended with pregnancy, and the birth of a child during the husband's absence, be pleaded, it is useless to prove more than a few facts, such as the birth of a child, identity, and non-access.(m) A long adulterous intercourse and cohabitation of the husband, the birth, maintenance, and acknowledgment of a child, may be pleaded, if there is nothing that necessarily affects the wife with a knowledge thereof.(n)

So where the husband's adultery is to be proved by the pregnancy of other women, and the acknowledgment of children, it is not necessary to plead particular acts of adultery.(o) Where the evidence did not amount to judicial proof of the wife's adultery, but her conduct had been so culpable as to raise strong suspicions of criminality, and induce the court to rescind the conclusion to admit fresh evidence, proof that during the progress of the suit the alleged *particeps criminis* had frequently visited her alone, and remained late at night, will, coupled with the former evidence, be sufficient to found a sentence of separation.(p) A separation was decreed in a suit for restitution of conjugal rights, brought by the wife, in which the husband pleaded her adultery and proved gross impropriety of conduct, absence from home (unaccounted for), letters from her, containing admissions of guilt, and endeavours to induce individuals to give false representation as to where she slept, although the exact place where the adultery was committed was not proved.(q) If the guilt of the husband [ \*408 ] in a suit by the wife, is once established, and he seeks to deprive her of her remedy by imputing to her a criminal charge of any kind, such charge must be established by evidence

(i) *Loveden v. Loveden*, 2 Hagg. Cons. R. 3, 4.

(j) Canon, 105.

(k) *Burgess v. Burgess*, 2 Hagg. Cons. R. 207.

(l) See post, p. 410-412.

(m) *Richardson v. Richardson*, 1 Hagg. Eccl. R. 6.

(n) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. 777, Suppl.

(o) *Durant v. Durant*, 1 Hagg. Eccl. R. 746.

(p) *Hamerton v. Hamerton*, 3 Hagg. Eccl. R. 1.

(q) *Owen v. Owen*, 4 Hagg. Eccl. R. 261.

which admits of no dispute.(r) The court must receive the evidence of friends, dependants, and servants, who can alone speak as to domestic conduct, with some drawbacks.(s) In examining evidence and proofs the court must not take the charge insulated and detached, but the whole together, and must consider what has been the admitted conduct of the party under similar circumstances.(t) The witnesses should be required to answer their belief or impression as to whether adultery has been committed or not, though the court cannot rely on such opinion.(u)

*General Cohabitation of Parties.*—The act of adultery may be inferred from the general cohabitation of the parties, so as to exclude the necessity of proof of particular facts, although the parties have separate beds.(v) It may be possible that persons of peculiar and eccentric disposition or habits, may live together in such manner without actual criminal connexion; and it is physically possible that persons may be in the same bed together without criminal intercourse. Courts of justice however cannot proceed on such ground; finding persons in such a situation as presumes guilt *generally*, they must presume it in all cases attended with those circumstances. They cannot adopt the extravagant professions of Platonism for the principles of their decisions.(w)

Lord Stowell observed, "there may be imprudence of different kinds and degrees, and there are degrees of imprudence from which a court of justice will infer guilt. Here are visits, which are described by her confidential servant as made in such a manner that did not deceive her. At Farnham, near Bury, the same witness says 'that he had a bed in the house constantly for three-quarters of a year.' Another witness says 'he lived there.' For a long time, wherever she is, he \*is there also; and there is one consideration, which extends over the whole history, which [ \*409 ] is, that here is a young woman separated from her husband, and a young officer constantly together. They are living in the same house, though under the bare appearance of separate beds. What is this state of cohabitation? I am not afraid to say that separation might justly follow from this alone, and that this might be the legal proof from which the court will presume guilt, for courts of justice must not be duped. They will judge of facts, as other men of discernment, exercising a sound and sober judgment, on circumstances that are duly proved before them. That a young woman, estranged from her husband, and a young officer, should be living together for months, and at different places, though under the flimsy disguise of separate beds, and that courts of justice should not put upon such intimacy the construction which every body else would put upon it, would be monstrous."(x)

According to the doctrine of the ecclesiastical court, and accord-

(r) *Turton v. Turton*, 3 Hagg. Eccl. R. 128.  
350.

(s) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 782, Suppl.

(t) *Durant v. Durant*, 1 Hagg. Eccl. R. 748, Suppl.

(u) *Crewe v. Crewe*, 3 Hagg. Eccl. R.

(v) *Loveden v. Loveden*, 2 Hagg. Cons. R. 4; *Cadogan v. Cadogan and Rutton v. Rutton*, ib. n.

(w) 2 Hagg. Cons. R. 6, n.

(x) *Chambers v. Chambers*, 1 Hagg. Cons.

Rep. 444, 445.

ing to all the principles in similar cases, if it can be once shown that the parties had been cohabiting in an illicit connection, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those under the same roof are not prepared to depose to that fact.(y)

In cases of adultery proof by two witnesses to distinct facts is sufficient to found a sentence of divorce. In support of a charge of adultery, one clear and unimpeached witness and circumstances in corroboration are all that the law requires.(z)

*Going to a Brothel.*—The wife's going to a brothel with another man is evidence of adultery. It is hardly to be conceived that a woman would go to such a place but for a criminal purpose.(a)

[ \*410 ] It seems that going to a brothel, and remaining alone for a \*considerable time in a room with a common prostitute, is sufficient evidence from which to infer adultery. A married man going to a brothel, knowing it to be a house of that description, raises a suspicion of adultery, necessary to be rebutted by the very best evidence.(b) When the charge is of keeping certain specific houses, to which the husband took divers loose women, it is sufficient to specify the places without specification of time.(c)

*Visits at the Private Lodgings of a Man.*—The law has not affixed the same imputation on the visit of a married woman at a single man's lodging or house as on going to a brothel. Such visits may be very improper, but the court must be satisfied in its legal judgment that the woman has transgressed, not only the bounds of delicacy, but of duty. In the absence therefore of other circumstances, to induce an inference of guilt, it will not arise from such a visit, where there is no evidence of any improper conduct or behaviour of the parties during such visit.(d) In a case at common law, the visit of the wife to a single man's house, combined with other circumstances, were held sufficient. In that case the windows were shut, and there were letters which could not otherwise be explained.(e)

*Venereal Disease.*—The venereal disease, long after marriage, is prima facie evidence of adultery.(f) The husband's attempts, when affected with venereal disease, to force his wife to his bed, is of a mixed nature, partly cruelty, and partly evidence of adultery, and would remove condonation of either.(g)

*Confession of Adultery.*—Confession generally ranks high in the scale of evidence; what is taken *pro confesso* is considered as indubitable proof. The plea of guilty by the party accused excludes fur-

(y) *Turton v. Turton*, 3 Hagg. Eccl. R. 719, 720, Suppl. 350.

(z) *Kenrick v. Kenrick*, 4 Hagg. Eccl. R. 130, 136. See *Crompton v. Butler*, 1 Hagg. Cons. R. 460; *Hutchins v. Denziloe*, ib. 111; *Elwes v. Elwes*, ib. 280; Ayliffe, Parer. 61.

(a) *Wood v. Wood*, Del. Nov. 25, 1789; 4 Hagg. Eccl. R. 138. See *Kenrick v. Kenrick*, ib.; *Timminge v. Timminge*, 3 Hagg. Cons. R. 11; *Loreden v. Loreden*, 2 Hagg. Cons. R. 114, 115; *Astley v. Astley*, 1 Hagg. Cons. R. 711; Ayliffe, Parer. 45.

(b) *Astley v. Astley*, 1 Hagg. Eccl. R.

719, 720, Suppl.

(c) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 777, Suppl. n.

(d) *Williams v. Williams*, 1 Hagg. Cons. R. 303.

(e) *Rickets v. Taylor*, cited ib.

(f) *Durant v. Durant*, 1 Hagg. Eccl. R. 767. Separation was decreed at the suit of the wife by reason of the adultery of the husband, the proof being the communication to her of the venereal disease. *Collett v. Collett*, 1 Curteis, 678, reversed by the Privy Council, 14th July, 1840.

(g) *Ibid.*

ther inquiry. *Habemus confitentem reum* is demonstrative, unless indeed motives can be assigned to it. But though confessions will support charges of the highest \*nature, as treason, murder, &c., they are not alone sufficient to establish a charge [ \*411 ] of adultery.(h) A sentence of divorce will not be given upon the sole confession of the parties. The principle upon which the rule is founded is a fear of collusion between the husband and the wife.(i)

To prevent fraud in these cases, the practice is for the judge (all persons, especially the husband, being removed apart,) to examine the woman as to the truth and cause of her confession, and to ascertain the truth by all other lawful ways and means. If there be fraud or deceit, or a probable suspicion of it, a sentence of divorce will not be granted, unless the adultery be otherwise satisfactorily proved.(k)

The 105th canon having required that divorce should not go on confession alone, the wife must give a negative issue; and it seems that the court is almost bound to reject an affirmative issue in a suit for separation for adultery, the husband cannot compel the wife either to give in a plea or to administer interrogatories.(l)

Confession is a species of evidence, which, though not inadmissible in cases of adultery, is to be regarded with great \*dis- [ \*412 ] trust; and though it is not absolutely excluded, but is received in conjunction with other circumstances, yet it is on all occasions to be most accurately weighed.(m) Confession of adultery, when perfectly free from all taint of collusion, when confirmed by circumstances and conduct, ranks amongst the highest species of evidence.(n) It was stated by Lord Stowell that the court was inclined to view confession, when not affected by collusion, as evidence of the greatest importance. At one time a confession, proved to the satisfaction of the court to be perfectly free from all suspicion of a collusive purpose, was admitted as sufficient to found a prayer for mere separation *a mensa et thoro*, though not for an absolute

(h) 1 Hagg. Cons. R. 304; 2 ib. 316. See 2 Russel on Crimes, 644-654.

(i) Gibs. Cod. 534; Oughton, tit. 213; Consol. 279, 280. There is a remarkable instance, showing the inexpediency of pronouncing sentences of divorce upon the sole confession of the parties. A prohibition was prayed on behalf of the children, who were in danger to be bastardized by collusion between the parties. C. married Mary, and had children by her; against whom it was libelled in the spiritual court that he had before married Anne, the sister of Mary; the husband and Anne appear and confess the matter, upon which, as the report sets forth, a sentence of divorce was to pass, whereas in truth C. was never married to Anne, but it was a contrivance between him and his wife to get themselves divorced after they had lived together sixteen years; 2 Mod. 315; Gibs. Cod. 534. The 105th canon is as follows:—

“Forasmuch as matrimonial causes have been always reckoned and reputed among

the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment; especially in causes wherein matrimony, having been in the church duly solemnized, is required upon any suggestion or pretext whatsoever to be dissolved or annulled, we do strictly charge and enjoin that in all proceedings in divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted out by the deposition of witnesses, and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the court.”

(k) Consol. 280. See Oughton, tit. 213.

(l) *Crease v. Crease*, 3 Hagg. Eccl. R. 131.

(m) *Williams v. Williams*, 1 Hagg. Cons. R. 304.

(n) *Harris v. Harris*, 2 Hagg. Eccl. R. 409, 410.

divorce *pro dirimendo matrimonii vinculo*, so as to enable a party to fly to other connexions; but it seems that this distinction is now disregarded, and the same rule applied indiscriminately to both cases.(o) As the rule is founded upon a fear of collusion between the husband and the wife, it seems it will not apply where the wife has written letters to third parties, containing confessions of her guilt, with a view of the same being kept secret, and on which she exercised her ingenuity how to account for her absence from home, and thus allay her husband's well-grounded suspicions.(p) The confession must be free from ambiguity.(q) But it need not apply to time and place. If general, it will apply to all times and places, at which it might appear probable, in proof, that the fact might have taken place.(r)

*Confession of Particeps Criminis.*—A *particeps criminis* is a competent witness to prove the fact of adultery;(s) and his confession as connected with the act of the wife has been admitted.(t) The declaration of a *particeps criminis* will be but weak evidence; but in the case where criminal intention is fully proved, and nothing but the consent of the other party is wanting, the conduct of such a person is evidence of a \*most stringent kind that the act which he was [ \*413 ] always attempting to accomplish has actually taken place.(u) A declaration of the paramour in the wife's absence that she had committed adultery previous to the adultery charged in the libel, is not admissible; but a declaration in her presence, and confirmed by her, is; and the court cannot reject it on the ground of its reflecting on third parties, nor that it does not establish adultery previous to the charges in the libel.(x) Where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged *particeps criminis* being communicated to her, are admissible evidence in behalf of the husband.(y) In *Burgess v. Burgess*,(a) a declaration of this kind was given in evidence, and that evidence, though objected to, was received. In the same case, in reference to a letter which was not in evidence at all, but which the party charged with the adultery had received from the person with whom the alleged adultery was committed, and which she had shown to her maid-servant, Lord Stowell said, when admitting the allegation in which this transaction was pleaded, "it may be of consequence to know how the wife expressed herself on this occasion; there may be something of joint acknowledgment." And his lordship, after stating that the husband had informed his wife of the confession of her paramour, and that she admitted "it was true," says, "by this acknowledgment she adopts the confession, which was the same as if she had confessed it originally herself."

*Identity of Party.*—Care must be taken that the person appearing and confessing the adultery is not some supposititious person, satis-

(o) *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 223.

(p) *Owen v. Owen*, 4 Hagg. Eccl. R. 261.

(q) *Williams v. Williams*, 1 Hagg. Cons. R. 214.

(r) *Burgess v. Burgess*, 2 Hagg. Cons. R. 207.

(s) 1 Hagg. Cons. R. 148, 376.

(t) *Burgess v. Burgess*, 2 Hagg. Cons. R.

(u) *Soilleux v. Soilleux*, 1 Hagg. Cons. R. 376.

(x) *Croft v. Croft*, 3 Hagg. Eccl. R. 318.

(y) *Harrie v. Harrie*, 2 Hagg. Eccl. R. 207.

(a) 2 Hagg. Cons. R. 233, 234, 235, n.

factory evidence must therefore be adduced as to the identity of the party.(b)

One rule upon the proof of identity is, that it is to be \*proved, not merely by the acknowledgment to the officer [ \*414 ] who served the citation and by the appearance of the party in the cause, but by extrinsic evidence.(c)

Another rule is, that the identity must be proved by other testimony than that of the parties themselves, it must be proved by witnesses who can speak to the facts from their own personal knowledge. In *Searle v. Price*,(d) Lord Stowell said, "in cases of adultery, no confession of the fact can be admitted alone, and in cases of this description it is the more necessary to guard against the imposition of making false acknowledgments to obtain a separation. A married person may afterwards wish the marriage avoided; for this purpose a former marriage might be propounded by the one party and admitted by the other; but the court could not rely on declarations thus made, and that too on oath, in furtherance of the common purposes. They might go further, by substituting false parties, who might admit themselves to be parties in the cause when they were not, and various impositions of this nature might be resorted to, to destroy the rights of the real parties. Even a decree of *confrontation* would not protect the court in such a case, as the real parties might be unknown to the officers of the court unknown to the practisers, and certainly unknown to the court itself, so that in this way a real marriage might be set aside without the least knowledge on the part of those interested in it."

*Verdicts in an action for Criminal Conversation.*](e)—In suits by reason of adultery it is usual to plead in the ecclesiastical courts the verdict, where damages have been obtained against the adulterer, but the introduction of verdicts was long resisted in that court, and they are now introduced merely as circumstantial evidence. Even where an action which fails has been brought, that is not a matter from which any thing can be drawn to the prejudice of the evidence actually adduced. The failure of the action may arise from a variety of circumstances not apparent to the ecclesiastical judge.(f) An action at law for the recovery of damages is not analogous to [ \*415 ] \*proceedings for a divorce. It is not brought against the same person, but against the adulterer, for the injury sustained; and where the husband has not felt the injury, no damages, or at least nominal damages only, will be given. But in the ecclesiastical court it is not the measure of the injury which is to undergo consideration, but whether the complainant is entitled to a separation or not.(g) The verdict is not evidence against the woman, it is introduced into

(b) Conset. 280. Caveat etiam iudex de his adulterii voluntariis confessionibus; ne persona supposititia (quod meis diebus bis novi) coram eo, ad adulterium libellatum confitendum, producat, quamvis coram eo allegetur, cum esse illius viri uxorem, qui divortium petit. Huic dolo, et fraudi, facile obviabit iudex (si de eo suspicatur) curando ut intersint coram eo, ante sententię prolationem, personę aliquę, fide dignę notitiam

exploratam habentes dictę confitentis mulieris.—Oughton, tit. 213, ss. 5, 6.

(c) *Williams v. Williams*, 1 Hagg. Cona. R. 305.

(d) 2 Hagg. Cona. R. 189.

(e) See ante, p. 387—394.

(f) *Loveden v. Loveden*, 2 Hagg. Cona. R. 51, 52; see *Elwes v. Elwes*, 1 Hagg. Cona. R. 288, n.

(g) 1 Hagg. Cona. R. 132.

the proceedings to satisfy the ecclesiastical court that the husband has honestly endeavoured to obtain all the redress that the law will afford.(h) In ordinary cases, it may be true, that a verdict for damages in an action of crim. con. has little or no weight in the proceedings instituted between the husband and wife in the ecclesiastical court, for the verdict is considered as *res inter alios acta*; and strictly and technically speaking, it is so. But such a verdict may have some weight in these courts, as a test of the credit of the witnesses, where the adulterer was fully and timely apprised who they were to be, and had full time to discredit them, if that had been possible, either at common law or in the ecclesiastical court. Especially where the adulterer has made every effort in defence from the time that the charge was originally set up against him, and has manifestly acted in concert with the wife for the protection of her character and of his own; under such circumstances the real substance of the proceeding at common law is not *inter alios acta*.(i)

*Collusion between the Parties in Actions.*—Collusion is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. The law permits no co-operation for such purpose, and refuses a remedy for adultery committed with such an intent; but it is not proof of collusion, that after the crime is committed both parties are desirous of a separation. A judgment by default against the paramour, and no defence on the part of the wife, are not proof of collusion.(j) It was forcibly contended that a verdict giving [ \*416 ] large damages rebuts the argument of connivance; because it \*shows either that no such defence was attempted, or that it was not proved. It has been often observed, that a verdict to the disadvantage of the husband is strong, because he is a party to both proceedings, and therefore such a verdict will operate in other courts; but a verdict against the adulterer is slight evidence against the wife, who is no party to the action, and who has no control in the conduct of it. At the time of the trial the wife is often at variance with the adulterer; he may have good reasons not to set up a defence which she may sustain. The defence of connivance is hazardous where the action is for damages, for it is to be proved by circumstances, and if it should fail, it will influence the damages. In a case where part of the wife's defence was, that the paramour was a man of debauched character, but he could not set up the turpitude of his own character, the court was satisfied that "it was impossible that the defence of connivance could have been submitted to the Court of King's Bench, and that such heavy damages could have been given on the evidence then before the ecclesiastical court, the judge of the latter court therefore would not suffer his mind to be influenced by the damages."(k)

*Lapse of Time before Suit is instituted.*—Lapse of time alone is not a sufficient bar in suits for divorce by reason of adultery.(l) There is

(h), 1 Hagg. Cons. R. 306.

(k) *Moorson v. Moorson*, 3 Hagg. Eccl.

(i), *Halford v. Halford*, Poynter on Mar. R. 107, 108.

riage, 2/1, 2d ed.

(l) *Ferrers v. Ferrers*, 1 Hagg. Cons. R.

(j), *Cresset v. Cresset*, 3 Hagg. Eccl. R. 134; see ante, p. 210, 211.

no limitation of time imposed by statute, or by any rule which the court has laid down for itself.(m) The first thing which the court looks to when a charge of adultery is preferred, is the date of the charge relatively to the date of the criminal act charged, and known by the party; because if the interval be very long between the date and knowledge of the fact, and the exhibition of them to the court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay, in order to take it out of the \*reach of such interpretations.(n) Forbearance in bringing the suit may not only be excusable, [ \*417 ] but meritorious, in hopes of reconciliation; and there is a great difference between the husband and the wife on this point. The husband may by his authority command the adherence and obedience of the wife; whereas the woman, in case of elopement and criminality of the husband, must adopt some other mode than that of compulsion. Therefore, even where the suit might have been brought before consistently with prudence, the court would not lay down as a rule that a woman not bringing her complaint immediately on the discovery should be afterwards barred from bringing her case before the court.(o) Though a husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him when afterwards seeking his legal remedy, yet this doctrine is not to be pressed against a wife unless in very particular cases. Even in the case of a husband, it is not invariably expected that he should show the time when the charge first came to his knowledge. It might be prudent and expedient for the success of his suit that he should do so, but it is not absolutely necessary—something must be allowed to convenience.(p) In a cause of divorce, articles to account for the husband's delay in instituting the suit are admissible, but need not be examined to unless the defence renders it necessary to justify his conduct.(q) In *Loader v. Loader*,(r) on proof of the wife's guilt, the court called for an affidavit from the husband, explanatory of his delay to bring the suit, and being satisfied therewith, pronounced the sentence. The husband is not barred of his divorce by reason of his having executed a deed of settlement after knowledge of his wife's adultery, allowing her a separate income.(z) A husband who, upon the discovery of his wife's adultery, commences a suit against her for divorce, but abandons such suit through want of funds to carry it on, is not thereby barred from seeking a divorce at a subsequent period.(a)

*The Effect of Deeds of Separation in the Ecclesiastical Courts.]—*

(m) *Mordaunt v. Mordaunt*, 2 Hagg. Cons. R. 135, n.; see *Popkin v. Popkin*, 1 Hagg. Eccl. R. 766, n.

(n) *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 313.

(o) *Ferrers v. Ferrers*, 1 Hagg. Cons. R. 130. See post, 436.

(p) *Kirkwell v. Kirkwell*, 2 Hagg. C. R.

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(q) *Richardson v. Richardson*, 1 Hagg. Eccl. R. 6.

(r) Cited 3 Hagg. Eccl. R. 155, n. See *Best v. Best*, 2 Phill. R. 155.

(z) *Coode v. Coode*, 1 Curteis, 757. 762, 763.

(a) *Ibid*, 1 Curteis, 755.



In legal contemplation, the legal character of husband and wife continues to exist notwithstanding any private understanding or agreement to live separate, which is not recognised by the law ;(s) therefore [ \*418 ] such deeds cannot be \*pleaded in bar of a suit for divorce by reason of adultery. In *Beeby v. Beeby*,(t) which was a cause of divorce by reason of the adultery of the wife, it was objected that the libel showed that the parties had lived in a state of separation, and that it was not competent to the husband to bring a suit of divorce, as he would not at common law be allowed to bring an action for damages.(u) But the court observed, that separation is not considered by the ecclesiastical court as a bar to divorce for adultery either previous or subsequent to the act alleged. It was not an answer to such a charge even in cases of malicious desertion. But in cases of voluntary separation, it would be more unreasonable that the wife should be at liberty to impose a spurious issue on the husband. The ecclesiastical court does not look on articles of separation with a favourable eye ; but they are not held so odious as to be considered a bar to the charges of adultery.

If a deed of separation be so worded as rightly to found a presumption that it might, according to the intention, give the wife perfect free agency, so as to sanction even adultery committed by the wife living apart from the husband under that deed, it seems that such presumption must be rebutted by evidence, in order to entitle the husband to a sentence of divorce by reason of such adultery committed by the wife after a separation. For though the mere separation of husband and wife is no bar to relief at the suit of one for adultery committed by the other, yet where a separation subsisted at the time of the adultery charged, it is peculiarly incumbent on the husband to make out satisfactorily to the court that he was not in any way accessory to the injury complained of. The Court of Appeal, however, without deciding whether the terms of the deed amounted to a license to the wife for the commission of adultery, held, that such a presumption was rebutted by other evidence adduced by the husband.(x)

(s) *Smyth v. Smyth*, 4 Hagg. Eccl. R. 514; *Nash v. Nash*, 1 Hagg. Cons. R. 142; *Beeby v. Beeby*, id. n.; H. C. 1 Hagg. Eccl. R. 710; *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 315; *Barker v. Barker*, 2 Addams, 275; *Sullivan v. Sullivan*, id. 299; *Westmeath v. Westmeath*, Jac. 126; 2 Roper on Husband and Wife, by Jacob, 270, n.

(t) 1 Hagg. Cons. R. 142, 143, n.

(u) See ante, p. 390.

(x) *Barker v. Barker*, 2 Addams, 287, 275. The parts of this deed principally relied on to ground that presumption, were in substance as follows, and such as are usually inserted in deeds of separation: The husband and wife mutually declared and agreed that they would continue to live separately and apart from each other henceforth but and during the time of their natural lives. And the husband covenanted with the wife that it should be lawful for her, from time to time, and at all times during the present coverture, to live separately and

apart from him, in such manner and at such place and places, and with such person and persons, as the wife should from time to time think proper to choose (notwithstanding her coverture), and as if she were sole and unmarried. And that the husband would not disturb or molest her in her person or manner of living, nor at any time or times thereafter, either by ecclesiastical censures or otherwise, require or endeavour to compel her to cohabit, &c. with him the said husband, and would not for that purpose or otherwise use any force, violence, or restraint to her person, or sue or cause to be sued any person or persons whomsoever for or on account of receiving, harbouring, lodging, protecting, or entertaining her, but that she might in all things live and act as if she were sole and unmarried, without the restraint or coercion of the said husband, or of any person or persons by or through his means, assent, consent, privity or procurement.

\*In *Sullivan v. Sullivan*, (y) similar provisions in a deed of separation were held not to amount to a license for [ \*419 ] the wife to commit adultery, but inserted merely for enforcing, as far as may be, the continuance, and for preventing the determination, of the separate state in which the parties covenanted to live, by means of a suit for restitution of conjugal rights, although perfectly nugatory for that purpose.

*Malicious Desertion.*—Malicious desertion is a ground of divorce in some countries, but not in England; (z) and although it will not justify a wife in resorting to unlawful pleasures, it is not considered as a matter perfectly light in the behaviour of a husband complaining of his wife's adultery, that he has withdrawn himself without cause and without consent from the discharge of duties which belong to the very institution of marriage, and if he does so, he ought to feel less surprise if consequences of human infirmity shall follow. (a) The principal feature of malicious desertion is, leaving the wife without any provision. Mere absence of the husband abroad for a considerable time, under particular circumstances, was held not to constitute malicious desertion. (b)

A divorce, on proof of adultery of the wife, is not barred by the desertion of the husband from a conviction of her crime, or by his not providing for her from inability to do so. (c)

*Wife's Rights how affected by Adultery.*—The husband does not forfeit his right to be tenant by the curtesy by living \*in [ \*420 ] adultery. (d) So the adultery of the wife was no bar of [ \*420 ] the wife's dower at common law. (e) Indeed it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the courts of common law took no cognizance. However, for the purpose of preventing that offence, or more probably with the view of protecting the heir against the danger of introducing a supposititious offspring into the family, it is enacted by statute 13 Edw. I. c. 34, commonly called the Statute of Westminster the Second, "that if a wife willingly leave her husband and go away and continue with her avowterer, she shall be barred forever of an action to demand her dower that she ought to have of her husband's lands if she be convicted thereupon." The forfeiture of the dower depends upon the fact of a living from the husband, and not upon the circumstances attending the elopement; and the statute was construed to include a woman who leaves her husband with her own free will, and afterwards lives in adultery. (f) In an action of dower, if elopement be pleaded, a replication that it was by the husband's license is bad. (g) A divorce *a vinculo matrimonii* is a good plea in bar of dower. (h) In *Powell v. Weeks* it is stated that a divorce on account of adultery is no bar of dower, because it is only *a mensa et thoro*, and not *a vinculo matrimonii*; (i) but according to another report

(y) 2 Addams, 299.

(z) 2 Addams, 302.

(a) 1 Hagg. Cons. R. 154, 155.

(b) *Sullivan v. Sullivan*, 2 Addams, 303.

(c) *Reeves v. Reeves*, 2 Phill. R. 125.

(d) *Sidney v. Sidney*, 3 P. Wms. 269, 276.

(e) 2 Inst. 435.

(f) *Hetherington v. Graham*, 6 Bing. 135; 3 Moore & P. 135; see 2 Inst. 434.

(g) *Coot v. Berty*, 12 Mod. 232.

(h) Co. Litt. 32 a, n. 9.

(i) Noy, R. 108.

a divorce for adultery is a bar.(j) On the principle that condonation extinguishes the right of complaint, *reconciliation* was pleadable to a charge of elopement and adultery in bar of dower.(k) After a divorce *a mensa et thoro*, which had remained in force during the coverture, the court of chancery will not assist the wife in recovering her dower, nor decree her a distributive share of her husband's estate.(l) A wife divorced *a mensa et thoro* on account of her adultery forfeits her right to her moiety and widow's chamber, \*according to the custom of London.(m) The wife by her elopement with an adulterer does not forfeit her jointure; and notwithstanding her misconduct she may enforce in a court of equity articles making a provision for her separate use;(n) and it is an unavailing defence on the part of the husband that the wife is living separate from him in adultery (o) A bond given by the husband to secure an annuity to his wife is not affected by her adultery.(p)

In cases where no settlement has been executed, but funds belonging to the wife are in court, and applications have been made by both parties after adultery by the wife, each claiming the funds, the course adopted by the court has been to withhold the fund altogether, and neither to give it to the husband, as being the wife's property, nor to the wife, lest it might induce her to continue in adultery; although the husband was allowed to receive out of the dividends the costs of a groundless suit instituted by the wife against him in the ecclesiastical court.(q) So the court refused to order a provision for a wife out of dividends to which she was entitled for life, who was living on a mere separation apart from her husband, an officer going from place to place on duty, who was willing to receive her.(r) But if the husband has deserted the wife, and the court has a continuing power over her property, the court will maintain her out of it during the desertion.(s)

We have already seen that the court will enforce a settlement of the property of female wards who have married without consent, and afterwards lived in adultery.(t)

The husband of a woman who elopes from him, whether she lives in adultery or not, is not liable to be charged for her \*contracts.(u) So where the husband turns his wife out of doors on account of her having committed adultery under his roof, he is not liable to necessities furnished to her after her expulsion.(v) The husband is not bound to receive or to support his wife after her commission of adultery, although he had before been guilty of adul-

(j) 1 Roll. Abr. 681; Co. Litt. 32 a, n. 9.

(k) *Lady Ann Powis v. Herbert*, Dyer's N. W. 106; Co. Litt. 32 b; 1 Bro. Ent. 204; *see Harris v. Morris*, 4 Esp. 42.

(l) *Nhute v. Nhute*, Pro. Ch. 111.

(m) *Pettifer v. James*, Bunb. 16.

(n) *Nidney v. Nidney*, 3 P. Wms. 269; *see Ives v. Ives*, Dick. 391.

(o) *Mumt v. Winter*, 3 P. Wms. 276, n. by 410; *see* 4 Roper on Husband and Wife, 124 127.

(p) *Feld v. Morris*, 1 Bos. & P. N.R. 121.

(q) *Hull v. Montgomery*, 2 Ves. jun. 191;

4 Br. C. C. 339; *Carr v. Eastbrooke*, 4 Ves. 146; *see Wathyns v. Wathyns*, 2 Atk. 96.

(r) *Bullock v. Menzies*, 4 Ves. 798.

(s) *Wright v. Morley*, 11 Ves. 12; *Lloyd & Gould*, 327; *Oxenden v. Oxenden*, 2 Vern. 493; Pro. Ch. 239; *Williams v. Calow*, 2 Vern. 752; *Wathyns v. Wathyns*, 2 Atk. 96; *see post*, of Alimony.

(t) *Ball v. Couthe*, 1 Ves. & B. 302; *ante*, p. 318.

(u) *Morris v. Martin*, Str. 647; *Child v. Hardyman*, ib. 875. *See post*, pp. 437, 438.

(v) *Ham v. Tacey*, Selw. N. P. 260.

tery, and turned her out of doors without any imputation on her conduct; in such a case the ecclesiastical court would not assist the wife in a suit for restitution of conjugal rights.(x) A man is not liable to the penalty 5 Geo. 4, c. 83, s. 3, for refusing to maintain his wife, who has left him and committed adultery, although he has been guilty of the same offence since her departure.(y)

But where a man, knowing his wife to have committed adultery, allowed her to live separately in his house without making her any provision, the husband was held liable to necessities furnished by a person who was ignorant of the way in which the wife lived.(z) Though an adulterous elopement will prevent the husband's liability during its continuance, it is no answer where the husband has taken his wife back, and afterwards turned her out of doors without any fresh misconduct on her part.(a)

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#### SECT. IV.—OF CRUELTY.

*Duties of Conjugal Relation.*—The duties of the conjugal relation, like those of all other reciprocal affinities, however minutely divided and subdivided, are involved in the simple obligation to make those who are the object of it as happy as possible. The husband ought to promote the happiness of the wife—the wife is bound to seek the happiness of the husband. This rule is sufficiently efficacious where affection is sufficiently strong. The marriage vow is morally violated not only by adultery, but by “any behaviour which knowingly renders the life of the other miserable; as desertion, neglect, prodigality, drunkenness, peevishness, penuriousness, jealousy, \*or [ \*423 ] any levity of conduct which administers occasion of [ \*423 ] jealousy.”(b) Most of these causes, however, are without the pale of legal interference. Cases of occasional disagreement and misunderstanding too often occur, and then what is the duty? An eminent philosopher has thus answered the question.(c) “In such cases it is obviously necessary that for mutual peace the will of one should be submitted to the will of the other; and if a point so important as this were left to the decision of the individuals themselves, without any feeling of greater duty on either side, the disagreement it is evident would still be continued under a different name; and instead of combating who should concede, the controversy would be, of whom it was the duty to make the concession. It is of most important advantage, therefore, upon the whole, that there should be a feeling of duty to be called in for decision in such unfortunate cases; and since, from various circumstances, natural and factitious, a man is everywhere in possession of physical and political superiority, since his education is usually less imperfect, and since the charge of providing for the

(x) *Gevier v. Hancock*, 6 T. R. 603.

(y) *Raz v. Flintan*, 1 B. & Ad. 227.

(z) *Norton v. Faxon*, 1 Bos. & Pull. 226.

(a) *Harris v. Morris*, 4 Esp. 41.

(b) Paley's Moral Phil. b. 3, part 3, ch. 8.

(c) See Brown's Philosophy of the Human Mind, lecture 88.

occasion to observe that every thing is, in legal construction, *scævitia*, which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive such treatment proceeds; it may be from turbulent passion, or sometimes from causes which are not inconsistent with affection. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated. Secondly, the law does not require that there should be many acts; for if one act should be of that description, which should induce the court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference. Thirdly, it is not necessary that the conduct of the wife should be [ \*427 ] entirely without blame; for the reason which would \*justify the imputation of blame to the wife will not justify the ferocity of the husband."(*p*)

*Upon what Principles the Court interposes.*—The general ground upon which the court proceeds in these cases is danger to the life or health of the party: and if persons quarrel about matters not affecting the great end of marriage, they must decide them as well as they can in their own domestic forum. There must be ill treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent of injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case. So likewise what may aggravate the character of ill treatment must be deduced from various considerations; in some degree from the station of the parties; in some degree from the condition of the person suffering at the time of the infliction of the alleged injury. The complexion of individual acts may be heightened, nay, the acts may almost change their very essence by the accompaniments. Not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention.(*q*)

In suits founded on cruelty, the species of facts most generally adduced are, first, personal ill treatment, which is of different kinds, such as blows or bodily injury of any kind; secondly, threats of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury. For causes less stringent than these, the court has no power to interfere, and separate husband and wife: it is necessity alone which has conferred on the ecclesiastical court that power, and in a regard to self-protection alone must the exercise of that power be guided. Under any other circumstances the court cannot put asunder those whom God has joined. This is the wise and prudent rule; were it otherwise, the time of the court might be

(*p*) *Holden v. Holden*, 1 Hagg. Cona. R. *D'Aguilar v. D'Aguilar*, 1 Hagg. Eocl. R. 22.  
 (*q*) *See 2 Hagg. Eocl. Rep. Suppl. 72*;

consumed in mere domestic quarrels. The court has no right to consider whether a separation might not in point of fact be for the happiness of the parties, nor whether one party or the other has been guilty \*of misconduct, nor whether there has been a want of [ \*428 ] that affection which ought to subsist in the matrimonial state; for it must not be forgotten that marriage is in this country considered of that sacred and binding force, that parties who enter into such a connection are not for slight and unimportant reasons to separate themselves from the duty of cohabitation. When facts of the description to which the court has adverted are admitted to proof, it is perfectly consistent with the principles already mentioned, that minor circumstances should be also admitted; because on many occasions they may illustrate other facts; they may afford information of importance, and where the witnesses do not speak with precision, or where the evidence is not clear, they may influence the amount of alimony (if the suit be successful) to be allotted to the wife. But these circumstances must not be light or trifling, they should be of the same character as the principal charges, though not to the same extent. Therefore, where the court was of opinion that all the circumstances pleaded would fail, if proved, to establish that the wife could not return to cohabitation without risk to life or limb, the libel was rejected.(r)

The husband's conduct is legal cruelty if by cohabitation the wife is exposed to bodily hazard and intolerable hardship. On proof of such conduct and the husband's adultery with three different women, a sentence of separation *a mensa et thoro* was pronounced on the wife's prayer, and the husband condemned in costs.(s)

*Blows.*—A blow between parties in the lower conditions and in the higher stations of life bears a very different aspect. Among the lower classes blows sometimes pass between married couples, who in the main are very happy and have no desire to part; amidst very coarse habits such incidents occur almost as freely as rude or reproachful words, a word and a blow go together. Still even among the very lowest classes there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the discipline of which *emollit mores*, and tends to extinguish ferocity; \*if a nobleman of high rank and ancient family [ \*429 ] uses personal violence to his wife, his equal in rank, the choice of his affections, the friend of his bosom, the mother of his offspring—such conduct in such a person carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable. The particular situation of the parties when the ill treatment is inflicted may create a still further aggravation.(t)

But a mere violent act, which occasioned pain and injury to the wife, unaccompanied by any threat or any intentional blow, will not warrant a sentence of separation, for the court has no authority to

(r) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 263. Eccl. R. 773.  
265, 266.

(t) Per Sir J. Nicholl in *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. 73.

interfere in cases short of personal violence or a reasonable apprehension of it.(u)

Where circumstances of sufficient violence are admitted to proof, minor circumstances may also be admitted, but they must not be light or trifling, but they should be of the same character as the principal charges, though not to the same extent. An interdict of the wife's intercourse with her family is not cruelty to a wife, though under circumstances it may tend to illustrate the temper of the husband.(x) For although it may be a harsh exercise of marital authority to forbid the wife to hold intercourse with her own family, there may be circumstances which will justify such a prohibition.(y)

*What Words constitute Cruelty.*—Words of abuse and reproach are not, but words of menace, intimating a malignant intention of doing bodily harm and affecting the security of life, are legal cruelty. If words of menace raise a reasonable apprehension it matters not whether they be addressed to the wife or a third person. The court must not wait till threats are carried into execution, but must interpose when words raise a reasonable apprehension of violence and excite such terror as makes life intolerable.(z) Words of menace, if [ \*430 ] accompanied with a probability of bodily violence, will be sufficient. It \*may be enough if they are such as inflict indignity and threaten pain. It will be the duty of the court to release the suffering party from continuing cohabitation under such treatment.(a) Words of mere present irritation, however reproachful, will not enable the court to pronounce a sentence of separation. The wife must try to disarm them by weapons of civility and kindness; and if they fail, according to the law of this country, she must submit to the misfortune as one of the consequences of her own injudicious choice. Passionate words do not, according to the vulgar observation, break bones: and it is better that they should be borne with, than that domestic society should be broken up, and a husband and wife thrown as loose characters upon the world. Words of menace, importing the actual danger of bodily harm, will justify the interposition of the court, as the law ought not to wait till the mischief is actually done. But the most innocent and deserving woman will sue in vain for its interference for words of mere insult, however galling; and still less will that interference be given if the wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation.(b)

*Other acts when and when not Cruelty.*—Spitting on the wife is a gross act of cruelty, and in an old case,(c) a prohibition was denied in which the only act of cruelty pleaded was spitting in the face which was adjudged sufficient. But the husband's taking to a separate bed is not pleadable as cruelty.(d)

(u) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 270. Eccl. R. 775, 776.  
New post 431.

(s) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 268, 269.

(y) *Waring v. Waring*, 1 Hagg. Cons. 364.

(z) *See Maimonides de Matrim. Jud.*

(a) *D'Aguilar v. D'Aguilar*, 1 Hagg.

(a) *Kirkman v. Kirkman*, 1 Hagg. Cons.

R. 409.

(b) *Oliver v. Oliver*, 1 Hagg. Cons. R.

364.

(c) *Cleburn's case*, Hotley, 149; *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 776.

(d) *Ib.* 775.

The husband's attempt, when affected with the venereal disease, to force his wife to his bed, is of a mixed nature, partly cruelty and partly evidence of adultery.(e) The husband's attempt to debauch his own women servants is a strong act of cruelty.(f) A groundless and malicious charge against the wife's chastity followed up by turning her out of doors, \*and not attempted to be pleaded [ \*431 ] nor proved, may be alleged with other acts of cruelty as a ground for separation.(g)

In a suit for divorce by reason of the husband's adultery and cruelty, the court will not inquire into his depriving his wife of her separate property; but it is otherwise as to her paraphernalia. Obtaining the wife's separate property by imposition cannot, but compelling her by threats to go any where, may be pleaded as cruelty.(h) The refusal of the husband upon request to furnish necessaries to his wife, either by himself or his agent, is a culpable act; but if a wife does not think fit to make any request or demand, the husband cannot be fixed with cruelty merely because he refuses one particular mode of supplying her with money, and which mode he was never bound under any circumstances to practice.(i) The not allowing the wife to have access to her child, though the husband certainly may do it, yet it is a most improper exercise of the marital power, very disgraceful to the person who practises it, and a most wanton and unnecessary outrage upon the feelings of a mother.(k)

Minute acts of cruelty should not be pleaded, but properly come out in evidence. When the charge is of keeping certain specified houses, to which the husband took divers loose women, specification of place is sufficient, without specification of time. A long adulterous intercourse and cohabitation, the birth, maintenance, and acknowledgment of a child, may be pleaded, if there is nothing which necessarily affects the wife with the knowledge thereof.(l)

*Cruelty without personal Violence.*—Cruelty may be without actual personal violence; and such cruelty, at least when coupled with adultery, may found a sentence of separation on both grounds, although the parties had separated upwards of three years, and the husband was not seeking a return to cohabitation, and the husband had been bound, with two sureties, under articles of the peace exhibited against him, \*to keep the peace towards his wife.(m) It is not [ \*432 ] necessary to prove acts of personal violence to substantiate a charge of cruelty: it is the acknowledged doctrine that danger to the person and health is sufficient. In *Robinson v. Robinson*(n) ill

(e) *Durant v. Durant*, 1 Hagg. Eccl. R. 767.

Wilfully and knowingly communicating the venereal disease to a wife amounts to an act of cruelty as a cause of divorce; after two instances of infection communicated to her by the husband, although condoned, proof by medical evidence on inspection and other circumstances, although sixty days after separation from him, of her having been again infected, held to entitle her to a separation by reason of adultery. *Collett v. Collett*, 1 Curt. 678, reversed by the Privy Council, 14th July, 1840.

(f) *Durant v. Durant*, 1 Hagg. Eccl. R. 768.

(g) *Ib.* 769.  
(h) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 774, 776, n.

(i) *Evans v. Evans*, 1 Hagg. Cons. R. 123.

(k) *Evans v. Evans*, 1 Hagg. Cons. R. 121.

(l) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 776, 777.

(m) *Hulme v. Hulme*, 2 Addams, 27.

(n) Cited 2 Phill. R. 96.



nature, violent passions, and frequent abuse of his wife, were proved against the husband from the time of his marriage; he had frightened her so as to occasion several fits of illness; he refused her medical assistance; in short, he had been a bad husband, but had not beat his wife, that charge was not brought against him; several instances of adultery were proved, and the court pronounced for a divorce on both grounds.(o)

Deliberate insult, confinement, adulterous connection with a person kept in the same house, and invested with the government of the family, and other acts calculated to distress and harass a wife, as connected with adultery, proved, have been held to be acts amounting to cruelty in the man.(p)

*Irritability of Temper, with ungoverned Passion.*—The court decreed a separation, where the misconduct imputed to the husband was not that of cold malignity, or savage, continual unfeeling brutality of disposition, nor satiated possession, producing disgust and hatred; the acts charged were not inconsistent with occasional kindness, with the existence and continuance of strong attachment, nay, even with violent affection; but the main features of the alleged cruelty were great irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and of course attended with the danger of a repetition of personal mischief.(q)

*What wounds mental Feelings.*—What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, [ \*433 ] even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty, they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue, by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous; and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings, arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt, and therefore, though the court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute

(d) *Man Ching v. Ching*, 2 Phill. R. 95.  
(p) *Smith v. Smith*, 2 Phill. R. 207.

(q) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. Suppl. 73, 74.

cruelty where it would not otherwise have existed, of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessities, as the use of a carriage or servant, is not cruelty.(r)

*Domestic Quarrels not Ground of Interference.*—It is not the habit of the court to interfere in ordinary domestic quarrels; there must be something which makes cohabitation unsafe; for there may be much unhappiness from unkind treatment, and from violent and abusive language; but the court will not interfere; it must leave parties to the correction of their own judgment; they must bear as well as they can the consequences of their own choice. Word of menace are different; \*if they are likely to be carried into effect, [ \*434 ] the court is called upon to prevent their being carried on to mischief. Where blows are resorted to, the case is still more aggravated; there mischief is actually done or inflicted to a certain degree, and a divorce *a mensa et thoro* will be decreed.(s)

*Provocation on part of Wife.*—A wife is not entitled to a divorce by reason of the cruelty of her husband, if she is a woman of bad temper, and provokes his ill-usage;(t) her remedy in such cases is by her changing her own manners.(u)

A husband is not to be deprived of his marital rights because a wife pertinaciously resists them, and in the course of that resistance encounters accidental injuries which never were meant to be inflicted. As where an accident occurred in consequence of the vexatious and unjust refusal of the wife to deliver keys, to the possession of which the husband was entitled, and in the course of his endeavours to obtain them from her by force she was slightly bruised.(x) The court, in releasing a wife from cohabitation on the ground of cruelty, presumes her not to have been the authoress of her sufferings; it is on the presumption that her own conduct has been proper, if not, the remedy is in her own power; she has only to change her conduct; otherwise the wife would have nothing to do but to misconduct herself, provoke the ill-treatment, and then complain. The law however would interfere if this misconduct was visited by the husband with intemperate violence; there may be failings, if inordinately resented and visited with a harsh and more than due authority, upon which the court would not decline to interfere. But if her conduct be totally incompatible with the duty of a wife, if it be violent and outrageous, if it justly provoke the indignation of the husband and causes danger to his person, she must reform her own disposition and manners; she must remedy the evil by changing her own measures, and it is to be hoped that the evils will cease with the behaviour which produced them; if they do not, she may then complain to the court, and solicit its interference with effect.(y)

(r) *Evans v. Evans*, 1 Hagg. Cons. R. 38, 155.

(s) *Harris v. Harris*, 2 Phill. R. 111; 2 Hagg. Cons. R. 148, 149.

(t) *Taylor v. Taylor*, 2 Lee, 172.

(u) *Waring v. Waring*, 1 Hagg. Cons. R.

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(s) *Oliver v. Oliver*, 1 Hagg. Cons. R.

371.

(y) *Waring v. Waring*, 2 Phill. R. 132,

133.

[ \*435 ] *\*Husband may sue for Divorce on ground of Wife's Cruelty.*—The complaint of cruelty generally proceeds from the wife as the weaker person; but it may come from the man, and has done so in several cases.(z) Where the evidence clearly established that the wife was not mistress of her own passions, the court decreed a separation in a case of divorce by reason of cruelty, brought by the husband against the wife for "violent and outrageous conduct."(a)

*Desertion of Wife by Husband.*—The law does not approve the determination of a husband to leave his wife, and has provided the remedy of restitution. In the case of a suit instituted for a divorce by reason of cruelty, by a wife against her husband, the court cannot issue a monition for either party to return.(b) Lord Stowell said, that he could never make desertion a ground of separation, though in conjunction with acts of cruelty it frequently is; and though it may be thought hard to send a wife back to a husband, who has given her such a proof of alienated affections, yet the court does not send her back without due care for her reception; for the monition is, not only that he shall take her back, but that he shall treat her with conjugal kindness; and though the court cannot interfere in the minute detail of family life, for much must ever be left to the consciences of individuals, yet the court will see its monitions so far obeyed, that the great obligation of conjugal duty shall be complied with.(c) If a wife proceeding against her husband for cruelty and adultery was not originally justified in withdrawing from cohabitation, the court must pronounce her under the obligation to return.(d)

*Reconciliation after Cruelty.*—After a reconciliation, fresh acts of cruelty will revive former acts of cruelty, and also of adultery.(e) If legal cruelty be established, a subsequent reconciliation and matrimonial intercourse form a legal bar to \*a separation for [ \*436 ] such preceding cruelty. And the question then is, whether any subsequent acts take place, furnishing fresh grounds of legal complaint, or at least reviving former wrongs, and in connection with those former wrongs, creating a reasonable apprehension of a renewal of ill-treatment.(f) Lord Stowell thus described condonation and its effects; "Condonation is a conditional forgiveness, that does not take away the right of complaint in case of continuation of adultery, which operates as a reviver of former acts."(g) The force of condonation varies according to circumstances. The condonation by a husband of a wife's adultery, still more repeated reconciliations after repeated adulteries, create a bar of far greater effect than does the condonation by a wife of repeated acts of cruelty. Cruelty generally consists of successive acts of ill-treatment, if not of personal injury, so that something of a condonation of the

(z) *Waring v. Waring*, 1 Hagg. Cons. R. 154.

(a) *Kirkman v. Kirkman*, 1 Hagg. Cons. R. 409.

(b) *Evans v. Evans*, 1 Hagg. Cons. R. 119. See ante, p. 419.

(c) *Evans v. Evans*, 1 Hagg. Cons. R. 120.

(d) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 784.

(e) *Worsley v. Worsley*, 2 Lec. 572.

(f) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. Suppl. 112.

(g) *Ferrers v. Ferrers*, 1 Hagg. Cons. R. 130. See post, p. 445.

earlier ill-treatment necessarily takes place.(h) If a wife after legal cruelty consents to a reconciliation and to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute original cruelty, though the reconciliation would be a bar if no further ill-treatment took place.(i) A suit for restitution of conjugal rights strongly infers that at the time of the instituting such suit the party had no reasonable ground to apprehend personal violence; but it does not amount to an absolute bar to a sentence of separation for antecedent cruelty; *a fortiori* it would not exclude the wife from pleading acts of harshness and severity previous to such suit, in conjunction with acts of cruelty subsequently.(j)

*Delay in complaining.*—A wife's delay in applying to the ecclesiastical court for redress from cruelty does not infer that there is no ground of complaint, nor even raise a presumption against the truth of the charge. An intermediate separation so approximates two periods of cohabitation, that acts of cruelty happening [ \*437 ] before the separation may be looked upon as if they had happened recently.(k)

*What may be pleaded in cases of cruelty.*—A party before the court in a suit for divorce by reason of cruelty may plead acts of adultery subsequent to the citation.(l) In a similar suit brought by the wife, an acquittal of her witnesses (for a conspiracy in counseling her to institute the suit) upon an indictment laid by the husband, and his evidence thereon, in which he admitted and repeated certain accusations originally alleged in the libel as acts of cruelty, may be pleaded as a continuation and admission on oath of such cruelty.(m)

In *Best v. Best*,(n) it was held that, in a suit against the husband for cruelty, a defensive allegation, pleading distinctly and substantively adultery by the wife, was admissible without a separate citation on the part of the husband; and this practice has since been acted upon in analagous cases. In *Barrett v. Barrett*,(o) the wife was permitted, in a suit instituted against her husband by reason of cruelty, to give in additional articles to the libel pleading acts of adultery. Under a citation for cruelty only, in a suit for separation by the wife, adultery by the husband occurring prior to the institution of the suit, but sworn to have come recently to the wife's knowledge, may be pleaded, even though publication of the evidence on the libel, and on a responsive plea, is about to pass.(p) Cruelty cannot be pleaded responsively to the allegation admitted on behalf of the husband, charging the wife with adultery, for there is no point more clearly settled than that cruelty cannot be pleaded in bar of a charge of adultery;(q) although it may be pleaded as introductory to the history of the adulterous intercourse.(r)

(h) *Westmeath v. Westmeath*, 2 Hagg. 22.

Eccl. R. Suppl. 113.

(i) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. Suppl. 114.

(j) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 268.

(k) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 780, 781. See ante, p. 416.

(l) *Barrett v. Barrett*, 1 Hagg. Eccl. R.

(m) *Bray v. Bray*, 1 Hagg. Eccl. R. 163.

(n) *Addams*, 411.

(o) 1 Hagg. Eccl. R. 22.

(p) *Sampson v. Sampson*, 4 Hagg. Eccl. R. 286.

(q) *Harris v. Harris*, 2 Hagg. Eccl. R. 411; ante, p. 400.

(r) *Ashley v. Ashley*, 3 Phill. R. 300.

*Husband liable for Wife's Necessaries when she leaves him for Cruelty(s)*—If a husband conducts himself towards his wife with [ \*438 ] such a degree of misconduct and cruelty as to render \*it no longer safe for her to remain in his house, she is not to be turned out into the street to starve, or to seek relief in the parish workhouse, but is justified in leaving her home, and goes forth into the world with a credit for the necessaries of life suitable to her condition. A husband who has so conducted himself cannot determine his liability by a mere request on his part that she will return; and unless there be an amicable arrangement, he can only compel the return of his wife by obtaining a decree for that purpose in the spiritual court.(t) But the husband is not liable for money expended in the education of his children, whom the wife had taken with her on leaving his house on account of his cruel treatment.(u) A wife who has reasonable ground to apprehend personal violence from her husband is justified in leaving him; and if the apprehension be such as a jury shall deem to have been felt upon reasonable grounds, the husband is liable to the payment of board and lodging provided for his wife.(x) But where there was no evidence of actual terror or violence, but the principal circumstance relied upon was the husband having placed a profligate woman at the head of his table, and having told his wife, that if she did not like to dine there she might dine in her own chamber, although such conduct was highly improper, it was held that the husband was not liable for necessaries, because she might have had them if she stayed in her husband's house, and she had her remedy by a suit for a divorce *a mensa et thoro*, and for alimony.(y) In another case it was held, that if a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, and she thereupon removes and lives apart from him, he is bound to provide her with medicines in sickness during the separation.(z) The tradesman supplying necessaries to a woman living apart from her husband, cannot recover against him without showing that there was some justifiable cause for her so living.(a)

[ \*439 ] \*SMUT. V.—OF THE CAUSES WHICH BAR DIVORCE.

I. (1) of Composition of the Crime or Recrimination . . . . .	439
II. (1) of Concubinage . . . . .	445
III. (1) of Coverture . . . . .	449

The three general grounds usually pleaded in answer to a suit instituted for obtaining a divorce for adultery are recrimination or

(s) *New note*, pp. 481, 499; post, as to alimony.  
(t) *Henry v. Henry*, 1 Y. & J. 501; *Corbett v. Poelnitz*, 1 T. R. 5.  
(u) *Ston, Will. New Harris v. Morris*, 4 Esp. 4th ed.  
(x) *Hudges v. Hudges*, Peake's Addl. 441.  
(y) *Clifford v. Laton*, 3 Carr. & P. 15.  
(z) *Moore*, 482; 2 C. & P. 22.  
(a) *Mainwaring v. Leslie*, 2 Carr. & P. 507; *Clifford v. Laton*, 3 Carr. & P. 15.

*compensatio criminis*, a compensation of the crime, condonation, and connivance.(a) According to Ayliffe there are five cases wherein a divorce cannot be had on account of adultery:(b) First, if both the married parties are convicted of adultery; for since there are some misdemeanors that are taken away by mutual compensation, of which adultery is one; a compensation may be made of this crime, for it is unjust for one person to judge of another, and not to give another leave to judge of himself. Secondly, if the husband himself prostitutes his own wife. Thirdly, if the wife be free from any fault, as not having an intention of committing fornication or adultery; as when a woman marries another man through belief that her former husband is dead, for upon the return of the former husband she is bound to forsake her second husband and to return to her first, unless after his return she, with his consent, remain with the second, or unless another person had carnal knowledge of her through error and mistake, she believing him to be her own husband. Fourthly, if she be forced or ravished. And fifthly, if the husband has reconciled himself to her after the adultery committed by her, or knowingly retains her after she has committed adultery.(c)

# 1. OF COMPENSATION OF THE CRIME OR RECRIMINATION.

The remedy of divorce by a clear principle of law is denied to a party who is guilty of the same offence as that of the [\*440] party complained of. A compensation of the crime [ \*440 ] hinders a divorce, that is, if the defendant proves that the plaintiff hath also committed adultery, the defendant is absolved as to the matters requested in the libel of the plaintiff.(d) The doctrine of the ecclesiastical courts of England admitting a plea of recrimination, or *compensatio criminum*, is founded on the principle that a man cannot complain of the breach of a contract which he has violated.(e) This rule was admitted in England, and it was unanimously recognized by all the delegates as the standard canon law of the country in all cases of divorce.(f) But it seems that in Scotland recrimination is no bar to a divorce for adultery.(g)

(a) *Crewe v. Crewe*, 3 Hagg. Eccl. R. 129.

(b) Parer. 226.

(c) Septem casus ex jure Canonico collecti, enumerantur ab universis doctoribus, in quibus non licet ob adulterium celebrare divortium; qui ad triplex caput reducuntur. Primum est; quia alter conjux est ejusdem criminis particeps aut pariter adulterans; aut adulterio alterius consensum præbens. Ex quo primus et secundus casus consurgunt. Secundum, est quia culpa vacat adulterium, ac proinde non est formaliter adulterium, sed tantum materialiter, ex quo oriuntur tertius, quartus, quintus et sextus casus. Tertium est; quia conjux injurio ob

adulterium affectus, illam condonat. Sanchez de Divortio, lib. 10, disp. 5.

(d) Conset. 280, pl. 5; Clarke's Praxis, tit. 115; Cockburn, 126, pl. 3. Compensatio criminis (id est) si pars rea probaverit partem agentem etiam adulterium commisisse, absolvenda est pars rea, quoad petita in libello partis agentis. Oughton, tit. 214, pl. 1; see Clarke's Praxis, tit. 115.

(e) *Beeby v. Beeby*, 1 Hagg. Eccl. R. 790.

(f) Lord and Lady Leicester's case, 1737, cited 1 Hagg. Cons. R. 148.

(g) Jardine, Dict. 338; Lockhart Fac. Coll. 7, Dec. 1799; Ersk. Inst. by Ivory, B. 1, tit. 6, s. 5, n.; but see Lord Bankton, B. 1, tit. 5, s. 128.

cohabitation. Lord Stowell said, "The texts of the canon law, the dicta of all commentators and professors, concur in holding out that there is no distinction between a delinquency of the husband committed *before or after* a wife's infidelity in its complete efficiency as a bar to a claim of legal separation." So by the law of this country, a husband forfeits his remedy of a legal separation from his offending wife by his incontinence, proved to have taken place subsequently to the discovery of his wife's infidelity, although there may be no reason to presume otherwise than that he had always confined himself to his marriage bed till after the voluntary separation which followed the discovery.(x) In such a case many consequences of considerable hardship will press severely upon a husband, whose own irregularities may naturally be supposed to have originated mainly in the previous failure of duty on the part of the wife. He will be *prima facie* the father of the spurious offspring which the wife may happen to produce. He is *prima facie* liable for the debts which the wife may con-

[ \*414 ] tract in this state of separation. \*He will be under the necessity of proving, by means not always easy or convenient to be had, an absolute non-intercourse, in order to deliver himself from these painful obligations whenever they press. It is to be added, that he is likewise to be barred, in consequence of a failure in an application for a divorce, from obtaining that complete relief which the legislature dispenses, of an entire dissolution of all connection with a woman who has violated all her conjugal duties.(y) The arguments however, as to the hardships suffered by the husband from a refusal of a sentence of separation under such circumstances, are unavailing, being an inconvenience which an indiscreet husband brings upon himself, and which the law imposes upon him. It is also to be remembered that the wife will equally suffer inconvenience by a sentence passed against her, and by being turned loose upon the world.(z)

*Solicitation of Chastity.*—It seems to be doubtful whether the mere solicitation of chastity on the part of the husband would be considered as a bar to a sentence of divorce for adultery, proved to have been committed by the wife.(a) In *Foster v. Foster*,(b) where the husband was barred of his remedy, the court thought him in a great measure the author of his own dishonour. There was gross neglect on the part of the husband, and the solicitations were such as led strongly to the inference that adultery had been committed. The wife had been exemplary in her conduct for ten years; she was carried to Lisle, and there left by the husband. During these ten years he was using all means to seduce, almost to force the maid servants. Three denied the adultery, the fourth refused to answer. Whether that was sufficient to entitle the wife to a sentence of separation on her part was considered doubtful by the court.

The desertion of a wife by the husband though a *malicious deser-*

(x) *Proctor v. Proctor*, 2 Hagg. Cons. R. 299.

(y) *Proctor v. Proctor*, 2 Hagg. Cons. R. 299, 306; *ante*, p. 377.

(z) *Astley v. Astley*, 1 Hagg. Ecol. R. 722.

(a) *Chettle v. Chettle*, 3 Phill. 507.

(b) *Ib.* 509. See 1 Hagg. Cons. R. 152. 313.

tion, will not bar a sentence of divorce at the suit of the husband, on proof of adultery committed by the wife.(c)

\*2. OF CONDONATION.

[ \*445 ]

Another bar to a suit for a divorce is condonation or forgiveness of the alleged injury. If the party accused of adultery shall prove that the accuser before the commencement of the suit had probable knowledge of the crime committed, and yet afterwards cohabited with the accused, in such case the accuser shall not obtain a sentence of divorce, for the crime shall be supposed to have been remitted.(d) Condonation is either express or implied; it is express when signified by words or writing, and implied from the conduct of the parties, as when, for instance, after reasonable knowledge of the infidelity of the other, the parties continue to live in a state of matrimonial connection.(e) Condonation may be collected from a variety of facts and circumstances, so as to bar the right of divorce.(f) The force of condonation as a bar varies according to circumstances. The condonation by a husband of a wife's adultery, still more repeated reconciliation after repeated acts of adultery, create a bar of far greater effect than does the condonation by a wife of repeated acts of cruelty.(g)

Condonation bars sentence; but not necessarily where there is *subsequent* adultery, though it will induce the court to look with particular jealousy into the case; for if the adultery is forgiven with such extreme facility as to show no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground of complaint, for he *\*has encouraged the adultery by his* [ \*446 ] conduct; *volenti non fit injuria*; and courts allowing such facility, instead of being the guardians of morality encourage corruption.(h)

Condonation extinguishes the right of complaint, except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation and operates as a revivor of former acts.(i) If a wife forgives earlier adultery, upon condition and assurance of

(c) *Sullivan v. Sullivan*, 2 Addams, 299; ante, pp. 383. 419. 435.

(d) See *Consett*, 281; *Cockburn*, 127, pl. 4. Similiter; si actio divortii, propter adulterium, instituta fuerit, per mulierem contra virum (vel, e contra) ad obtinendum divortium, propter adulterium; si pars rea, in hoc casu, allegaverit et probaverit, partem agentem, ante hanc litem institutam, habuisse notitiam, saltem probabilem, criminis commissi et libellati, et tamen postea carnale commercium cum parte reâ habuisse; pars agens non obtinebit sententiam divortii; quia in hoc, dicitur partem agentem hanc injuriam (id est, crimen objectum) remisisse et condonasse; *Oughton*, tit. 214, pl. 2.

(e) Hæc autem remissio (condonatio) est duplex, quædam expressa, quando, scilicet verbis expressis innocens conjux adulterium sibi reconciliat, condonans delictum. Alia autem est remissio tacita. Ut si, conjux adulterii conscius, alium non exclusit a consortio maritali, vel exclusum, admisit; *Sanchez de Divortio*, lib. 10; *Disp.* 5.

(f) *Rest v. Best*, 1 Addams, 413; *Savile's case*, cited *ibid.* note. See 4 *Ves.* 202.

(g) *Westmeath v. Westmeath*, 2 *Hagg. Eccl. R.* 113, *Suppl.*

(h) *Dunn v. Dunn*, 2 *Phill R.* 411.

(i) *Durant v. Durant*, 1 *Hagg. Ec. R.* 761; *D'Aguilar v. D'Aguilar*, *ibid.* 781; *Ferrers v. Ferrers*, 1 *Hagg. Conn. R.* 130.



the husband's future amendment, on his again committing adultery the previous injury revives.(k) In a suit for divorce, on account of the husband's adultery after a condonation of former adulteries, there must be, in order to establish condonation of subsequent adultery as a bar to the wife's remedy, evidence that she was aware of this renewed misconduct; nor can such knowledge be inferred from slight facts and from cohabitation, but it must be clearly and distinctly proved.(l) Condonation being merely retrospective, if the offence forgiven is afterwards renewed, the party has a right to revert to former facts, if brought in conjunction with later.(m) Circumstances may take off the effect of condonation which would not support an original cause. Acts of cruelty revive adultery, though they would not support an original suit for it.(n)

In order to found a legal condonation as a bar to separation for adultery, there must be complete knowledge of all the adulterous connection, and a condonation subsequent to it.(o)

A lunatic, on recovering possession of his senses, may condone adultery committed during his lunacy.(p)

The wife having committed adultery on the first of three successive nights, and the husband aware and having full knowledge of this, [ \*447 ] sleeping with her on the second, condones \*thereby the previous adultery, and cannot take advantage of further adultery on the third night.(q)

*Difference between Condonation on the part of the Husband and Wife.*—Condonation may be express or implied; as by the husband cohabiting with a delinquent wife: for it is to be presumed he would not take her to his bed again unless he had forgiven her; but the effect of cohabitation is justly held less stringent on the wife; she is more *sub potestate*, more *inops consilii*; she may entertain more hopes of the recovery and reform of her husband; her honour is less injured and is more easily healed. It would be hard if condonation by implication was held a strict bar against the wife. It is not improper she should for a time show a patient forbearance; she may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife; a woman may submit to necessity. It is too hard to term submission mere hypocrisy. It may be a weakness pardonable in many circumstances.(r) To avoid condonation the husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him, when afterwards seeking his legal remedy; but it is not invariably expected that he should plead the period when the charge first came to his knowledge; it may be prudent and expedient to do so, but it is not absolutely necessary: nothing must be allowed to convenience.(s) Condonation with

(k) 1 Hagg. Eccl. R. 745.

(l) *Durant v. Durant*, 1 Hagg. Eccl. R. 743, *suppl.*

(m) *Ferrers v. Ferrers*, 1 Hagg. Eccl. R. 721

(n) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 723. *Manilla*, pp. 435, 436.

(o) *Durant v. Durant*, 1 Hagg. Eccl. R. 743; *Turton v. Turton*, 3 Hagg. Eccl. R.

351; *Bramwell v. Bramwell*, 3 Hagg. Eccl. R. 629.

(p) *Parnell v. Parnell*, 2 Phill. R. 160.

(q) *Timmings v. Timmings*, 3 Hagg. Eccl. R. 83.

(r) *Becky v. Becky*, 1 Hagg. Eccl. R. 793, 794. See *Ferrers v. Ferrers*, *ibid.* 781\*, n.

(s) 2 Hagg. Cons. R. 273, 313.

respect to women is held not to bear so strictly; but a woman would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime and partaking of a polluted bed; although forbearance on her part will not bar her remedy where there is a reasonable hope of the husband's return to her society. Conjugal cohabitation, after an act of adultery avowed by the husband to the wife, may be condonation; but it does not follow that because she overlooked an offence which she could not prevent, that \*is to be construed to give an universal license to unlimited debauchery.(t) [ \*448 ]

It is not necessary for the wife to withdraw from cohabitation on the first or second instance of the husband's misconduct. It is legal and meritorious to be patient as long as possible. Forbearance does not weaken her title to relief; for it is not improper she should for a time entertain hopes of her husband's reform, especially where there is a large family.(u) Condonation is not presumed as a bar so readily against the wife as the husband.(x)

*Presumption from Cohabitation.*—The general presumption is, that a husband and wife living in the same house live on terms of matrimonial cohabitation; but particular circumstances may repel that presumption.(y) Where the husband's conduct has been very gross, and the parties have separate beds, there must, in order to found condonation on the wife's part, be something of matrimonial intercourse presumed; it does not rest merely on the wife's not withdrawing herself, for the court does not hold condonation so strongly against the wife, from whom it looks for long suffering and patience not expected nor tolerated in the husband.(z) Condonation therefore will not so soon bar a wife as a husband of the remedy of divorce.(a) The wife's unwilling acquiescence in a return to live in the same house, but without connubial cohabitation, does not amount to a complete forgiveness.(b) The mode in which, after a separation, a return to cohabitation was effected is material, to show whether there was or was not condonation. On the execution of articles of separation, not followed by matrimonial intercourse, the wife's reluctant assent to the husband having a bed-room in her house at the earnest entreaty of him and of mutual friends, and on his declaring "that he should be merely under the \*roof by sufferance," is no continuation [ \*449 ] of a former condonation.(c)

*Pleading Condonation.*—Condonation being a plea in bar, ought in strictness to be pleaded, that there may be an opportunity afforded of contradicting it, because it is not incumbent upon the complaining party to prove that there was no condonation.(d) At the same time the court is not precluded from noticing it, to this extent at least, that

(t) *Kirkwall v. Kirkwall*, 2 Hagg. Cons. R. 279; *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 786.

(u) *Durant v. Durant*, 1 Hagg. Eccl. R. 768, 752; *Beeby v. Beeby*, *ibid.* 793; post, pp. 453, 454.

(x) *Durant v. Durant*, 1 Hagg. Eccl. R. 752, Suppl. See 1 Hagg. Cons. R. 278.

(y) *Beeby v. Beeby*, 1 Hagg. Eccl. R. 796.

(z) *Dance v. Dance*, 1 Hagg. Eccl. R. 794.

(a) *Walker v. Walker*, 2 Phil. R. 156.

(b) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 782<sup>o</sup>.

(c) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. App. 118.

(d) *Elwes v. Elwes*, 1 Hagg. Cons. R. 292; *Williams v. Williams*, 3 Hagg. Eccl. R. 84; *Durant v. Durant*, 1 Hagg. Eccl. R. 733, 751.

if the fact appeared clearly and distinctly upon the depositions that there had been cohabitation subsequent to the knowledge and detection of the guilt, it might *ex officio* call upon the husband to disprove it.(e) Condonation not pleaded can only avail as a bar so far as it is fully established by evidence.(f) But it seems, that unless condonation be admitted by the adverse case, that it must be pleaded to estop the party.(g)

### 3. OF CONNIVANCE.

Connivance and collusion destroy all claim to remedy by way of divorce, and is founded on the obvious principle, that no man has a right to ask for relief from a court of justice for an injury which he was chiefly instrumental in effecting himself. *Volenti non fit injuria*.(h) Condonation and connivance are essentially different in their nature, though either may have the same legal consequence. Condonation may take place, without imputing either in the case of a wife or of a husband the slightest degree of blame, especially in the case of a wife, whose conduct might be more meritorious from her forgiveness of injury. But connivance necessarily involves criminality on the part of the individual who connives, and therefore the evidence to establish it should be more grave and conclusive.(i)

[ \*450 ] \*Collusion may exist without connivance, but connivance is generally collusion for a particular purpose.(j) The law requires that there should be no co-operation between the parties as to the commission of an act of adultery, and will not grant a remedy where the adultery is committed with the view of afterwards obtaining a separation.(k)

In several cases the wife has been dismissed on that ground, although the adultery was fully proved, where the corrupt connivance of the husband was fully established.(l)

The law imposes upon the husband the obligation of cautiously protecting and guarding his wife from all associations that might expose her purity to hazard; or, by lowering her standard of female virtue, prepare the way for the inroads of the seducer. The court maintains the necessity on the part of the husband of jealously watching over the society, conduct and habits of his wife, in order to prevent irreparable injury to the great bonds of domestic happiness and peace.(m)

This principle is very clearly established; but what degree of neglect, however culpable, short of an actual and voluntary exposure of the wife to the seduction of an adulterer, would be sufficient, in order to bar a suit for divorce by reason of adultery, is no where laid down, at least with that distinctness and precision, which would fur-

(e) *Elwes v. Elwes*, 1 Hagg. Cons. R. 292.

(f) *Beeby v. Beeby*, 1 Hagg. Eccl. R. 795.

(g) *Durant v. Durant*, 1 Hagg. Eccl. R. 751, Suppl.

(h) *Forster v. Forster*, 1 Hagg. Cons. R. 144; *Harris v. Harris*, 2 Hagg. Eccl. R. 415; *Rogers v. Rogers*, 3 Hagg. Eccl. R. 58; *Reeves v. Reeves*, 2 Phill. R. 125.

(i) *Turton v. Turton*, 3 Hagg. Eccl. R. 350.

(j) See ante, p. 415.

(k) *Crewe v. Crewe*, 3 Hagg. Eccl. R. 130.

(l) *Timmings v. Timmings*, 3 Hagg. Eccl. R. 76; *Lovering v. Lovering*, ib. 85.

(m) 2 Hagg. Eccl. R. 414.

nish a safe guide for the court to act upon. Although no case of this kind may have been the subject of judicial decision, it can be conceived that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence. Under such circumstances perhaps the court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct, \*when the adulterous connection arose [ \*451 ] from the society and temptations to which he had introduced his wife.(n)

*Husband's Conduct must be free from Imputation.*—The ecclesiastical court requires that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife; and if he has relaxed with one man, he has no right to complain of another. Therefore, where the wife made no defence to a suit for divorce by reason of her adultery, the court dismissed the suit on the ground that the husband having connived at the wife's adultery with A., could not complain of an act of adultery nearly contemporary with B.(o)

Great facility in condonation of adultery with A., taking no notice of adultery with B., (of which the husband could not be ignorant,) conduct amounting to an invitation to adultery with C., not merely giving free scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt, and matrimonial cohabitation, after being in possession of full legal proof of such adultery, are criminal connivance and collusion, which will bar the husband of legal relief on account of his wife's adultery, although fully proved.(p) However culpable the wife may be, yet if the husband has been negligent and suffered her to form a connection and live on terms of cohabitation with another man, the court will not grant a separation. The adultery of the wife being proved, but she having, without her husband, resided in a gentleman's house, (of which she was treated as the mistress, and where she was delivered of three children,) without the husband sufficiently accounting for his absence, or providing for her, or interfering with such residence, the court dismissed her, on the ground that the husband by such conduct had consented to the connection and adultery.(q)

Mere imprudence and error of judgment are not connivance; and in determining whether the husband's behaviour has barred him from relief on proof of his wife's adultery, the \*honesty of his intentions, not the wisdom of his conduct, is to be considered.(r) [ \*452 ]

A husband is not barred by a mere permission of opportunity for

(n) *Harris v. Harris*, 2 Hagg. Eccl. R. 76.

15.

(o) *Lovering v. Lovering*, 3 Hagg. Eccl. R. 147.

L. 85.

(p) *Timmings v. Timmings*, 3 Hagg. Eccl.

(q) *Michelson v. Michelson*, 3 Hagg. Eccl.

(r) *Hoar v. Hoar*, 3 Hagg. Eccl. R. 137.

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adultery, nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit, and another to invite; he is perfectly at liberty to let the licentiousness of his wife take its full scope; but to contrive the meeting and to invite the adulterer, in order to obtain conclusive evidence of guilt, is legal prostitution.(s)

*Husband may be barred by Acquiescence.*—Passive connivance is as much a bar as active conspiracy, but there must be an intention that guilt should ensue, and such intention may be inferred from allowing improper familiarity.(t) It is not necessary that any active steps should be taken on the part of the husband to corrupt the wife to induce and encourage her to commit the criminal act. Passive acquiescence will be sufficient to bar the husband, provided it appears to be done with the intention and in the expectation that she would commit the crime; but on the other hand, it has always been held that there must be consent. The injury must be *volenti*; it must be something more than mere negligence; than mere inattention; than over-confidence; than dulness of apprehension; than mere indifference; it must be intentional concurrence, in order to amount to a bar.(u) Lord Stowell admitted the following position to be the true doctrine, "that passive consent is sufficient; but there must be a consent or acquiescence of his will, not mere negligence; not too high a confidence, or a misplaced confidence; there must be evidence that he was passively concurrent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure, and gave a degree of passive concurrence to it."(v)

Connivance of a passive and permissive kind is to be proved by a train of conduct and circumstances.(w)

[ \*453 ] The first general and simple rule is, if a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but this is not to be too rigorously applied without making allowance for defective capacity; dulness of perception, or the like, which exclude intention, is not connivance; there must be intention. The presumption of law is against connivance; and if the facts can be accounted for without supposition of intention, the court will incline to that construction. Undoubtedly there have been some persons who have conspired against the virtue of their wives to gain a separation, and (experience has proved) have even connived without such an object; but either of them is contrary to the usual conduct and disposition of mankind, and the court will presume according to the general rules of conduct. However, to bar the husband, there must be intention on his part, but mere passive connivance is as much a bar as active conspiracy.(x)

*Forbearance in Instituting Proceedings.*—Connivance may be inferred from forbearance in instituting proceedings. A husband is

(s) *Timminge v. Timminge*, 3 Hagg. Eccl. R. 21.

(t) *Mooroom v. Mooroom*, 3 Hagg. Eccl. R. 106.

(u) *Id.*

(v) *Alger v. Alger*, 3 Hagg. Eccl. R. 106, 107.

(w) *Walker v. Walker*, 3 Hagg. Eccl. R. 53.

(x) 3 Hagg. Eccl. R. 106.

(y) *Mooroom v. Mooroom*, 3 Hagg. Eccl.

R. 106, 107.

bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him when afterwards seeking his legal remedy, but this doctrine is not to be pressed against a wife unless in very particular cases. Even in the case of a husband it is not invariably expected that he should show the time when the charge first came to his knowledge. It may be prudent and expedient for the success of his suit that he should do so, but it is not absolutely necessary, something must be allowed to convenience. A wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but when there is nothing to show that the wife's suspicion must of necessity have been excited, or that the adultery might not have taken place without her knowledge, forbearance on the part of the wife under a reasonable hope of his return to her society, will not constitute a bar to her legal remedy when every hope of that kind shall be extinct.(y)

\*Where a husband has suspicions and some intimations [ \*454 ] of his wife's infidelity sufficient to convince his own mind, but not to instruct a legal case, the husband will not be debarred of his remedy because he continued to cohabit until his suspicions were confirmed by legal evidence.(y)

The husband is not bound to apply upon suspicion, he must wait for adequate proof, but he must be vigilant, for if he waits longer than is required for obtaining proof, he is barred of his remedy afterwards; if it be proved that there has been a long course of criminal conduct of which he was cognizant, or which by law and by presumption he must be supposed to have been cognizant, he cannot receive relief.

A constant intercourse continued for four years between a wife and her paramour, not clandestine, but the common subject of conversation among servants and friends, raises a grave suspicion of the husband's knowledge and acquiescence.(z)

A husband, if the matter is not divulged, may, from tenderness to his family and himself, or to his wife, be induced not to complain to a court of justice, upon strong reasons to believe the repentance of his wife. But a facility of condonation of adultery on the part of the husband leads to the inference that he does not duly estimate the injury, and will induce the court to look with jealousy on his subsequent conduct.(a)

*Plea of Connivance.*—In a suit for separation by reason of the wife's adultery, connivance on the part of the husband may be pleaded by the wife consistently with a denial of her guilt;(b) for such a plea does not necessarily admit adultery.(c) Active conspiracy appears in acts, but unless there are declarations to establish it, connivance must in general depend on circumstances, and it is to be gained from a train of conduct which the court is to interpret as well as it can. A plea of connivance must for the most part in its own nature be

(y) *Kirkwell v. Kirkwell*, 2 Hagg. Cons. R. 277; ante, pp. 416, 417, 436, 437.

(y) *Elwes v. Elwes*, 1 Hagg. Cons. R. 292.

(z) *Crosse v. Crosse*, 4 Hagg. Eccl. R. 132.

(a) *Timmings v. Timmings*, 3 Hagg. Eccl. R. 78.

(b) *Mooroom v. Mooroom*, 3 Hagg. Eccl. R. 87; *Gilpin v. Gilpin*, ib. 150.

(c) *Rogers v. Rogers*, 3 Hagg. Eccl. R. 58.

circumstantial and consist of many facts, trifling perhaps when taken [ \*455 ] separately, but altogether making a case \*calculated to affect the judgment of the court.(f) Mere indifference, ill-behaviour, or cruelty, is not pleadable in answer to a charge of adultery, nor relevant to a plea of connivance.(g) The court compels parties to bring the whole of their substantive case before it at once if possible, which is not always the case; for the knowledge of facts, or the proof by which facts are to be supported, may not always be in the power of the party, and then additional articles may be given in; but it must clearly appear to the court that they could not have been given in before; for a contrary practice would be extremely oppressive, especially where one party pays all the expenses on both sides. Therefore where much delay had occurred in the wife's defence, a plea of minute facts to establish connivance having been admitted, and the cause then standing "to propound all facts," an allegation of the wife, not responsive, but pleading more minutely, but to the same effect, as in a former plea, was altogether rejected, the facts not being *noviter perventa*.(h) Though the court will not on presumption, and in the absence of matter strongly inculpatory, impute to the husband the guilt of connivance, it will not debar him from pleading circumstances which make the history natural and consistent; for the party ought not to be forced ultimately to depend for an explanation of his conduct on the ingenuity of counsel or the discrimination of the court.(i) Where connivance is not pleaded, the court or the husband's counsel may take the objection of the wife's connivance, where it clearly appears on the face of the evidence adduced by the wife herself; but it is questionable whether it is competent to the husband to set up such a defence by interrogatory only, without giving the adverse party a full opportunity to answer: at all events to support such a defence so set up, the conduct and evidence to prove it must be most unequivocal and incapable of explanation.(k) To support a plea of connivance where [ \*456 ] no adultery during cohabitation is \*charged or admitted, the clearest evidence of intention and consent would be required. It seems doubtful whether connivance at adultery during cohabitation would be a bar in point of law against a suit for adultery with a different person long subsequent to separation.(l)

*Evidence of Connivance.*—The evidence to establish connivance is generally circumstantial, it rarely happens that it can be proved by one or two broad facts. If the facts are equivocal, the presumption is in favour of the absence of intention; it cannot readily be presumed that any husband would act so contrary to the general feelings of mankind, as to be a consenting party to his own dishonour; the effect of which would be to leave him legally bound for life to a corrupt and adulterous wife.(m) In a suit for separation for the husband's adultery with the wife's sister, proof that the wife, after knowledge of previous

(f) *Moorsom v. Moorsom*, 3 Hagg. Eccl. R. 93. 106.

(g) *Moorsom v. Moorsom*, 3 Hagg. Eccl. R. 92.

(h) *Moorsom v. Moorsom*, 3 Hagg. Eccl. R. 96.

(i) *Croft v. Croft*, 3 Hagg. Eccl. R. 312.

(k) *Turton v. Turton*, 3 Hagg. Eccl. R. 352.

(l) *Rogers v. Rogers*, Hagg. Eccl. R. 72.

(m) *Rogers v. Rogers*, 3 Hagg. Eccl. R. 60, 61.

adultery, allowed, under peculiar circumstances, this sister to accompany them to India and to live in the same house with them, was held not to bar the wife on the ground of connivance, her conduct, though imprudent, not having been traced to a disregard of her own honour, nor to any motive necessarily criminal. And the court intimated that even if connivance had been proved, that the wife would not have been debarred from a decree of separation in a case of incestuous adultery.(n)

It is not necessary to prove connivance to actual adultery any more than it is necessary on the other side to prove an actual and specific fact of adultery. If a system of connivance at the improper familiarity, almost amounting to proximate acts, be established, a corrupt intention as to the result will be inferred without more direct proof. The notoriously debauched character of the paramour, his exclusion from all respectable female society, the introduction of him by the husband to his wife, the encouragement of their intimacy, the allowing her to accept a supply of money from him, expostulations from her family at such intimacy, the refusal of the husband to attend to them, and improper familiarities and \*liberties in his [ \*457 ] presence and without his remonstrance, were held material facts in a plea of connivance.(o) On proof, either directly or presumptively, of the wife's adultery, great inattention on the part of the husband will not bar him. To establish such a defence he must have been privy to her guilt or have led her into the crime. A court of justice, on a suspicion of the husband's inattention, cannot suppose him accessory to the turpitude of his wife.(p) To establish connivance, in bar to a suit on account of the wife's adultery, it is not necessary to show knowledge of, and privy to, the actual commission of such indulgence; such extreme negligence to the conduct of his wife, and such encouragement of acquaintance and familiar intimacy as are likely to lead to an adulterous intercourse, are sufficient.(q)

Affectionate conduct to a wife for many years, no appearance during that time of a wish to withdraw from her society, and the absence of any reason to suppose that the husband knew or suspected her depravity till very shortly before she left him, tend most strongly to disprove connivance at the turpitude of, or active co-operation in, the prostitution of the wife.(r)

If the injured party is once in possession of a fact of adultery, and still continues his matrimonial cohabitation, it proves connivance, collusion, and facility, which will bar the husband of relief for his wife's adultery.(s) The long duration of a criminal intercourse, and delay in applying to the court, and the indirectness and want of stringency in the evidence, are strong presumptions against a preconcerted scheme to obtain a sentence by contrivance. A judgment by default against the paramour, and no defence on the part of the wife, are not

(n) *Turton v. Turton*, 3 Hagg. Eccl. R. 338. (q) *Gilpin v. Gilpin*, 3 Hagg. Eccl. R. 150.  
 (o) *Mooroom v. Mooroom*, 3 Hagg. Eccl. R. 87. (r) *Hoar v. Hoar*, 3 Hagg. Eccl. R. 139.  
 (p) *Rix v. Rix*, 3 Hagg. Eccl. R. 74—76. (s) *Timmings v. Timmings*, 3 Hagg. Eccl. R. 76. 83.



proof of collusion.(t) In *Hodges v. Hodges*,(x) the husband proved the wife's adulterous connection with one individual five years after [ \*458 ] separation under articles of agreement, of which \*connection two children were born; on a suit for separation by reason of the wife's adultery with such person, the court held that the husband's knowledge of, and consent to, gross indelicacies, or even adultery, with three other persons during cohabitation before the separation, would not bar the husband.

On proof of the wife's adultery, continued for four years, under circumstances which raised a strong suspicion that the husband could not have been ignorant, the court, after much hesitation and difficulty, granted the sentence of separation, as it could not affect the husband with a direct knowledge of the adultery, and as three witnesses had positively sworn they believed the husband was ignorant.(x)

[ \*459 ]

## \*CHAPTER V.

## OF MATRIMONIAL SUITS.

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## SECT. 1.—WHAT COURTS HAVE COGNIZANCE OF MATRIMONIAL CAUSES.

*Legality of Marriages how cognizable in Ecclesiastical Courts.*—

From very ancient times the ecclesiastical courts have possessed the sole and exclusive cognizance of questioning and deciding directly the legality of marriage, and of enforcing specifically the rights and obligations regarding the marriage state.(a) There are certain suits which can be entertained in these courts alone, such as suits for the restitution of conjugal rights—suits of nullity, instituted for the purpose of having marriages declared null and void, which are of two kinds; first, when the marriage is *ipso facto* void, and secondly, where the marriage is said to be voidable, as in cases of incest and impotence,—and suits for separation from bed and board by reason of adultery and cruelty. The validity of marriage is, in some cases, determined not as an original but as an incidental question in those ecclesiastical courts, which properly have no jurisdiction over matrimonial questions. Thus in the Prerogative Court of Canterbury,

[ \*460 ] whose authority in strictness is limited to the cognizance of \*testamentary suits, a question as to the validity of a

(t) *Crewe v. Crewe*, 3 Hagg. Eccl. R. 132, 136.  
133; ante, pp. 415, 416.

(u) 3 Hagg. Eccl. R. 118.

(x) *Crewe v. Crewe*, 3 Hagg. Eccl. R. 52.

(a) 4 Rep. 29; Moore, 169; *Legard v. Johnson*, 3 Ves. 352; see 4 Reeve's Hist.

marriage frequently occurs as an incidental point, necessary to be determined in order to decide on the competency of an interest set up in a testamentary cause, as an authority for opposing a will, or in order to ascertain the relationship of a party claiming a grant of administration in virtue of a marriage, the validity of which is denied in bar of such interest, (b) on the ground of its not having been solemnized, or that the parties were incapable of contracting. (c) But where a marriage within the prohibited degrees had not been declared void in the lifetime of the parties, the husband was held to be entitled to administration of his wife's effects. (d)

It is a maxim of the common law, that where the right is spiritual, and the remedy thereof only by the ecclesiastical law, the cognisance thereof appertains to the ecclesiastical court. (e) To give the spiritual court jurisdiction the whole cause ought to be spiritual. (f) The ecclesiastical judges proceed in causes within their cognisance according to such ecclesiastical laws as are allowed by law, not being against the common law, nor the statutes and customs of the realm. (g)

If an ecclesiastical court assumes a jurisdiction which it clearly has not, the proceeding will in general be wholly void, \*and [ \*461 ] even the officer enforcing its sentence will be liable to an action; and, in general, the defendant may stay the proceedings by plea to the jurisdiction, or by writ of prohibition. (h)

The jurisdiction of the ecclesiastical courts in matrimonial cases extends to persons not only of full age but under, provided they are old enough to contract matrimony. (i)

We have already seen that the ecclesiastical court has jurisdiction to decide upon the legality of the marriage of English subjects and sometimes of aliens celebrated in foreign countries, such marriages being in general decided according to the law of the place where they were celebrated. (k) In the case of marriages in this country between Christians the ecclesiastical court is in possession of the law upon which the decision is to be founded, but the court must be fur-

(b) Poynter, 166, 2d ed.

(c) *Steadman v. Powell*, 1 Addams, 58; *Browning v. Reane*, 2 Phill. R. 69; *Braham v. Burchell*, 3 Addams, 243; *Barnes v. McBride*, 4 Hagg. Eccl. R. 378.

(d) *Elliott v. Gurr*, 2 Phill. R. 16.

(e) Co. Litt. 96 a; 5 Rep. 66 b.; 2 Rep. 43; Plowd. 277.

(f) 7 Rep. 43.

(g) Co. Litt. 344 a. The statute 13 Edw. 1, called the statute *Circumspecte Agatis*, and 9 Edw. 2, called *Articuli Cleri*, are the most ancient as well as the principal statutes which declare in what cases the ecclesiastical courts have jurisdiction. The words of the first are, "the king to his judges sendeth greeting, use yourselves circumspectly in all matters concerning the Bishop of Norwich (who is only put for an example, for it extendeth to all the bishops within the realm, 2 Inst. 487,) and his clergy, punishing them

if they hold plea in court Christian of such things as be merely spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary is enjoined, especially if a freeman be convict of such things." Several other ecclesiastical matters are mentioned.

By a decree of the Council of Trent, which is not received as law here, (ante p. 18,) it is declared, *Si quis dixerit causas matrimoniales non spectare ad iudices ecclesiasticos; anathema sit.* Concilii Trident. Sess. 24, Can. 12, p. 243, ed. 1615.

(h) *Beaurain v. Sir W. Scott*, 3 Campb. 388; *Ex parte Jenkins*, 1 B. & Cross. 655; 3 Dowl. & R. 41; but see *Ackerley v. Parkinson*, 3 Maule & S. 411; post p. 464.

(i) *Hill v. Turner*, 1 Atk. 515.

(k) Aute, p. 130, 131.

nished with evidence as to the marriage law of Jews<sup>(l)</sup> or of foreign countries when any question arises upon it here.<sup>(m)</sup>

Questions as to the validity of marriages depending upon civil disabilities, and the provisions in the marriage acts, arise in a great variety of cases before other judicial tribunals, as committees of privileges in the house of lords—in suits in courts of equity—in the common law courts, in a great variety of actions—in criminal courts upon charges of bigamy—and in the inferior courts of quarter sessions upon cases of settlement of paupers.

*Incidental Right of Temporal Courts.*—The temporal courts have the sole cognizance of examining and deciding directly upon all the temporal rights of property; and so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage when the question occurs in the trial, and as a part of some other more general issue coming within the sphere of temporal jurisdiction.<sup>(n)</sup> In the decision of the proper objects of their jurisdiction, they do not want or require the aid of the spiritual courts; nor has the law provided any [ \*462 ] legal means of \*sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs,<sup>(o)</sup> upon the legality of a marriage or

(l) Ante, p. 67–69.

(m) Ante, p. 148–153.

(n) See Hagr. Law Tracts, 452.

(o) All real actions, except a writ of right of dower or writ of dower *unde nihil habet*, or a *quare impedit*, or ejectment, were abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. If the tenant, in an action of dower *unde nihil habet*, controverts the validity of the demandant's marriage with the person out of whose lands she claims dower, he may plead *ne unques accouple en loyal matrimoine*, (Co. Ent. 180 a; Com. Dig. Pleader, (2 Y. 10)). To which plea the demandant must reply that she was accoupled in lawful matrimony at B, in such a diocese, upon which a writ issues to the bishop of that diocese, requiring him to certify the fact to the court, (Co. Ent. 180 a; Rast. Ent. 228 b; Dyer, 313, a—368, b; *Ilderton v. Ilderton*, 2 H. Bl. 145.) The demandant cannot reply a sentence in the ecclesiastical court, declaring the marriage valid, for that is only matter of evidence, of which the bishop is the proper judge; but if the bishop has already certified the matter to the court, that certificate may be replied, and shall be a good *estoppel* against all the world, (*Robins v. Crutchley*, 2 Wils. 122, 127; Br. Ab. Estop. 78, as to bastardy.) As the bishop is the proper judge of marriage or no marriage, bigamy cannot be specially pleaded, but the tenant must plead *ne unques accouple*, &c. and contest the marriage in the Bishop's court, (Br. Ab. Dower, 54.) If the court in which the dower is demanded be an inferior jurisdiction which cannot write to the bishop, the record may be removed *per mittimus* into the Common Pleas, and

when the certificate is returned into that court the record may be remanded, as in case of foreign voucher, to the court below. None but the superior courts of record, as the Queen's Bench, Common Pleas, justices of gaol delivery, and the like, can write to the bishop, (Co. Litt. 134 a; Co. Ent. 180 b; Com. Dig. Pleader, (2 Y. 10); Booth, 167.) If the marriage was celebrated in Scotland, where there is no episcopal establishment, the fact must of necessity be tried by a jury, and, therefore, the replication should conclude to the country, and the issue will be tried in the county where the venue is laid; (*Ilderton v. Ilderton*, 2 H. Bl. 145); but unless the marriage be in Scotland, or some foreign country, if the replication to the plea of *ne unques accouple*, &c., conclude to the country, it will be bad, (*Robins v. Crutchley*, 2 Wils. 128.) The bishop must return to the certificate the fact of marriage or not, and not the special matter or evidence, (Dyer, 305, b, 313 b; *Easterby v. Easterby*, Barnes, 1; 2 Rol. Ab. 591. As to the mode of proceeding in the bishop's court, see Park on Dower, 290.) If the certificate be insufficient a new writ goes to the bishop, (2 Towns. Judg. 95, 96.) If the plaintiff will not sue out this writ, the defendant may do so upon notice to the plaintiff or motion, (*Smith v. Smith*, T. Jones, 38; see Roecos on Real Actions, 220, 221.) The inquisition is taken before the bishop in the following manner:—The writ is sent to the bishop to make the inquiry; for the ecclesiastical judge, before he hath received the king's writ, may not of himself inquire of the lawfulness of the matrimony; but after such time as he hath received the said

its immediate consequence \**“general bastardy,”*(*p*) or in [ \*463 ] like manner in some other particular instances, lying peculiarly in the knowledge of their courts, as profession, deprivation, and some others; in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received, and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute 9 Hen. VI., c. 11, requiring certain public proclamations to be made for the parties interested to come in and be parties to the proceeding. But even in these cases, if the ordinary should return no certificate, or an insufficient one, or if the issue is accompanied with any special circumstances, as if a second issue triable by a jury is formed upon the same record, or if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth.(*q*)

In all cases in which a writ goes to the bishop, it is sent to that bishop who has, or is at least presumed to have jurisdiction of the subject-matter as ordinary, and in no other character. Therefore, if a marriage is distinctly stated to have been celebrated out of any diocese, out of any actual or presumed jurisdiction of any ordinary, nay out of the kingdom, such marriage cannot be inquired into and certified by the bishop. Therefore where the trial cannot be by certificate, it is a fundamental and incontrovertible proposition, that the trial is to \*be by the country; and for a reason which is [ \*464 ] unanswerable, that there may not be a failure of justice.(*r*)

Of the *fact* of marriage the temporal courts ought to undertake the trial, and always do when the *fact only* is in question, as is usually the case in personal actions.(*s*) Thus where a father covenanted, on the marriage of his daughter with B., to assure copyholds: and in an action on the covenant, alleging a lawful marriage, it was objected that it ought to be tried by the certificate from the bishop, but it was held that the trial should be by a jury, for the marriage

writ, to make the inquiry, he must not surcease for any appeal or inhibition but must proceed until he hath certified the king's court thereof; and then when the bishop hath received the king's writ he doth give notice thereof unto the party who took exception to the matrimony at his dwelling-house, if he hath any, within the diocese, to speak at a day prefixed by him against the matrimony if he will; and after such notice given, whether the party come or not, the witnesses of the demandant to prove the legality of the matrimony are taken and admitted by the bishop, if no sufficient exception be taken to the witnesses. After the depositions taken they are published, and certified into the king's court, where the issue was joined by letters under the great seal of the bishop, importing that in pursuance of the said writ he hath made due inquiry, according to the ecclesiastical laws, into the matters therein contained;

and that he hath found by lawful proofs, and other canonical requisites in that behalf, that such person (as the case shall be) was or was not accoupled in lawful matrimony. For he must certify the point at issue generally, and not make a special verdict of it, or express the manner of the marriage at large. And after certificate made there shall be no appeal, but the same certificate shall be a bar, and conclude all parties forever. And after such certificate and summons of the tenant in the king's temporal court, judgment shall be given for the plaintiff. (Hughes, 293, 294; 2 Burn's Eccl. L. 486, 487; see Park on Dower, 290, 291.)

(*p*) Vin. Abr. Trial, (P.) pl. 22.

(*q*) De Grey, C. J., *Duchess of Kingston's case*, 20 How. St. Tr. 538, 539, n.

(*r*) *Ilderton v. Ilderton*, 2 H. Bl. R. 159. See Hardres's R. 65.

(*s*) *Basset v. Morgan*, 1 Lev. 41; 2 Roll. Ab. 584; Vin. Abr. Trial (P.) 21, pl. 43.

only was in issue, and not the lawfulness of it.(t) In an action of debt on a bond, the plea of never joined in lawful matrimony, which admits a marriage, but denies the legality of it, will not be admitted, for a marriage de facto is sufficient.(u) The fact of a second marriage during the existence of a former marriage, is a question for the decision of a jury on a trial of ejectment.(v)

The determination of any question concerning what power or jurisdiction belongs to ecclesiastical judges in any particular case, belongs to the judges of the common law.(x) The judges of the temporal courts have full cognizance of what marriages are within the Levitical degrees, and what not;(y) and will prohibit the ecclesiastical court from proceeding upon any other construction than that adopted by the former courts.(z) And they may prohibit the ecclesiastical court from questioning marriages as incestuous, which the temporal courts consider not to be so.(a)

*Prohibition.*—There are many jarring decisions on prohibitions, for when the power of the church ran very high, the judges were cautious in granting prohibitions; when it did not run so high, the judges ventured to go further in granting them.(b) It is well known that, in former times, a considerable degree of jealousy subsisted [ \*465 ] between the common law courts and those of ecclesiastical jurisdiction. But, as it is observed by a late learned judge, "Times are changed—a more liberal and enlightened view of questions of jurisdiction is taken; on the one hand, these courts have no disposition to encroach, *ampliare jurisdictionem*; or, on the other hand, temporal courts have no jealousy, no wish to resort to fictions and technicalities; they look (where not bound by former decisions directly in point) to the real substance and sound sense of the question—to that which is really beneficial to the suitors, the public, and the subjects of the country. There is quite as much business in all the courts as, under the increase of wealth and population, the institutions are able to discharge."(c) A prohibition will be granted to the spiritual court in all cases where the ecclesiastical judge proceeds in a matter out of his jurisdiction,(d) though the temporal court has not cognizance of the matter for which the libel is in the spiritual court for it is a sufficient cause for a prohibition, that the ecclesiastical court, exceeds its jurisdiction.(e) The courts of common law have, in all cases in which matter of a temporal nature has incidentally arisen, granted prohibitions to courts acting by the rules of the civil law, where such courts have decided on such temporal matters in a manner different from that in which the courts of common law would decide upon the same.(f) A prohibition to the spiritual court may be granted by the court of chancery.(g) The sentence of the ecclesiastical court cannot be reversed in a summary way, but by

(t) *Fletcher v. Pynsett*, Cro. Jac. 102.

(u) *Alleyne v. Grry*, 2 Salk. 437.

(v) *Pride v. Earl of Bath*, 1 Salk. 120.

(x) *Fuller's case*, 12 Rep. 41.

(y) *Harrison v. Burwell*, Vaugh. 207.

(z) *Duchess of Kingston's case*, 20 How. St. Tr. 541, n.

(a) *Vaugh.* 207.

(b) *Willes*, 680.

(c) Sir J. Nicholl, 1 Hagg. Eccl. R. 545.

(d) 2 Roll. 313, l. 42; Com. Dig. Prohibition, (A. 2.) (F. 1).

(e) Godb. 246, 247; Com. Dig. Prohibition, (F. 1).

(f) *Gould v. Gapper*, 5 East, 371.

(g) Fitz. N. B. 40, N.; Com. Dig. Prohibition, (B).

appeal only to the proper judges; nor can a prohibition to that court be granted upon a petition, but it may be done by motion, and a proper suggestion, showing that they have no jurisdiction. (h)

Though the ecclesiastical courts have the sole cognizance of the validity of marriages, yet where statutes are made upon such points of exclusive jurisdiction, the courts of common law have a right of issuing a prohibition, if the ecclesiastical courts vary from those courts in the interpretation which they \*put upon them; and this [ \*466 ] even after sentence, and although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings in the court below. (i) Where in prohibition the plaintiff declared that he had excepted to the libel in the ecclesiastical court on one ground, that the judge of that court would have to decide as to the construction of an act of parliament; it was held, that as it did not appear that the court were proceeding to decide on the act, or contrary to the common law, no ground was laid for prohibition. (k)

A point of practice is never a ground of a prohibition, though it is sometimes of a writ of error. (l) The temporal courts cannot take notice of the practice of the ecclesiastical courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the temporal courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court. (m)

The course of practice of an ecclesiastical court is matter of fact, to be proved by evidence; (n) or a certiorari may be issued to the judge of an inferior jurisdiction to return the practice of the court. (o)

A defendant cited in the ecclesiastical court must appear before he can apply for a prohibition. (p) Upon motion for a prohibition, the court of Queen's Bench is not bound to wait till the suit in the spiritual court is actually at issue; if the latter is clearly in progress towards the trial of a question, over which it has no jurisdiction, prohibition lies forthwith. (q) A prohibition does not lie after sentence, unless it appears by the sentence that the ecclesiastical [ \*467 ] court has pronounced on matters cognizable at common law, although there are several articles contained in the libel, some of which are so cognizable. (r)

*Proceedings in prohibition.*—By statute 1 Will. 4, c. 21, s. 1, it is enacted, that it shall not be necessary to file a suggestion on any appli-

(h) *Hill v. Turner*, 1 Atk. 515.

(i) *Gould v. Gapper*, 5 East, 345. See *Lord Camden v. Home*, 4 T. R. 397; *Blackett v. Blizard*, 9 B. & C. 851; 4 M. & R. 641; *Burgoyne v. Free*, 2 Addams, 418.

(k) *Hall v. Maule*, 3 Nev. & P. 459; 7 Ad. & Ell. 726.

(l) *Ex parte Smyth*, 2 Cr. M. & Rosc. 754; 1 Tyrw. & Gr. 226.

(m) *Ex parte Smyth*, 3 Ad. & Ell. 724.

(n) *Besurain v. Scott*, 3 Campb. 388.

(o) *Williams v. Bogot*, 4 Dowl. & R. 315.

(p) *Ex parte Law*, 2 Dowl. P. C. 528; 2 Ad. & Ell. 45; S. C. nom. *Rex v. Mills*, 4 Nev. & M. 8.

(q) *Byerly v. Windus*, 7 D. & R. 564; 5 B. & C. 1.

(r) *Hart v. Marsh*, 5 Dowl. P. C. 424; 1 Nev. & P. 62; 5 Ad. & Ell. 591; *Full v. Hutchins*, Cowp. 422; *Gardner v. Booth*, Salk. 548; Bac. Abr. Eccl. Courts, (C.)

cation for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his majesty, and shall contain and set forth, in a concise manner, so much only of the proceeding in the court below as may be necessary to show the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given, that the writ of prohibition do or do not issue as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs.

The judges of the ecclesiastical courts, who are appointed by the ordinary, and not by the crown, are subject not only to the control of the temporal courts for exceeding their jurisdiction, but also in some instances to the commands of the latter courts, if they decline to exercise their jurisdiction when by law they ought to exercise it.<sup>(s)</sup>

[ \*468 ] *\*Jurisdiction of Courts of Equity.*—Courts of equity have no jurisdiction to try the legality of marriage, especially after sentence in the spiritual court in a cause of jactitation of marriage, although the proceedings in the latter court were collusive. A woman brought a bill against her supposed husband's son by a former wife. He insisted she never was married to his father, but to one whose marriage with her was proved. Upon this the woman sued in the spiritual court in a jactitation cause, and obtained sentence against him, and relied upon it in chancery, where it was held to be conclusive evidence.<sup>(t)</sup> The defendant pleaded in answer to a bill a marriage and a sentence in her favour in the ecclesiastical court in a suit of jactitation of marriage, and the plea was allowed, the sentence being conclusive.<sup>(v)</sup> The fact of a marriage charged by the bill, and denied by the parties' answers (there being some circumstances in evidence from which a marriage might be inferred) must be tried at law, a jury being the proper judges of the fact.<sup>(u)</sup> The defendants by their answer objected that the plaintiffs, who claimed under their parents' marriage settlement, were illegitimate, no marriage having been solemnized until after their birth. A mar-

<sup>(s)</sup> 1 Addams, 266.

<sup>(t)</sup> *Hatfield v. Hatfield*, 5 Br. P. C. 100, 2d ed. cited Str. 961.

<sup>(v)</sup> *Meadows v. Duchess of Kingston*, Amb. 756. As to the effect of decisions in the ecclesiastical courts where they have con-

current jurisdiction, see *Bissell v. Artell*, 2 Vern. 47; *Bouchier v. Taylor*, 7 Br. P. C. 414; *Vanborough v. Cock*, 1 Ch. Cas. 300; *Bland v. Elliott*, Finch, 67; *Parker v. Dea*, Ib. 123; *Digby v. Cornwallis*, 3 Ch. R. 40.

<sup>(u)</sup> *Revel v. Fox*, 2 Ves. sen. 269.

riage de facto having been proved by the authenticated certificate of a regularly licensed clergyman, and by other unexceptionable evidence, it was held to lie upon the party impeaching the marriage to prove its nullity, and therefore in a case where that had not been attempted, the court of chancery pronounced in favour of the validity of the marriage for the purposes of the suit, without directing an issue.(x)

In one case the lord chancellor directed the validity of a Jewish marriage to be tried in the ecclesiastical court; for which purpose a suit of jactitation of marriage was instituted in the ecclesiastical court by the wife against the asserted \*husband.(y) And [ \*469 ] a suit has been directed to be instituted by the lord chancellor for trying the validity of the marriage of a ward of court.(z) And there are several instances of suits directed by the court of chancery to be instituted in the ecclesiastical court for the purpose of trying the validity of marriages of persons who have been found lunatic by inquisition.(a)

It does not come within the province either of a court of law or equity to decide whether there exist grounds of divorce by reason of adultery or cruelty;(b) or whether the conduct of the parties has been such as will entitle them to a divorce, to be obtained in the ecclesiastical court or in the house of lords.(c) So courts of equity have no jurisdiction to decree a separation between husband and wife.(d)

## SECT. II.—OF THE EFFECT OF SENTENCES OF ECCLESIASTICAL COURTS.

1. Of Sentences in Suits relating to Marriages, . . . . .	469
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### 1.—OF SENTENCES IN SUITS RELATING TO MARRIAGES.

*Sentences of Ecclesiastical Courts evidence in Temporal Courts.*—The common law courts give credit to the proceedings and sentences of the ecclesiastical courts upon matters within the peculiar jurisdiction of the latter courts.(e)

The certificate of the ordinary when returned to the temporal court is conclusive upon all parties upon questions of bastardy and marriage.(f)

(x) *Piers v. Tuite*, 1 Drury & Walsh, 279.

(y) *Lindo v. Belisaria*, 1 Hagg. Cons. R. 216; ante, pp. 70-72.

(z) *Warter v. Yorke*, 19 Ves. 451; ante, p. 313.

(a) *Smith v. Smith*, Poynter, 167 n., 2d ed.; ante, pp. 192, 193.

(b) *St. John v. St. John*, 11 Ves. 532.

(c) *Westmeath v. Westmeath*, Jac. R. 139.

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(d) *Angier v. Angier*, Gilb. Eq. R. 152;

Pre. Ch. 496; *Head v. Head*, 3 Atk. 547; 1

Ves. sen. 17; *Legerd v. Johnson*, 3 Ves. 353.

(e) 2 Ventr. 43; 5 Rep. 7 a; 7 Rep. 42 b;

Co. Litt. 125 a; 4 Rep. 29 a; *Jones v. Bow*,

Holt, 285; Bull. N. P. 113; *Morris v. Web-*

*ber*, 2 Leon. 169, 172, 176, 177.

(f) Bull. N. P. 245; 2 Wils. 128; *Rex v.*

*Rhodes*, Leach, 29; see ante, pp. 462-463.



[ \*470 ] Where in civil causes the temporal courts find the question \*of marriage directly determined by the ecclesiastical courts, they receive the sentence of these courts, though not as a plea yet as proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they receive it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. Hence a sentence of nullity and a sentence in affirmance of a marriage have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to real estate. A sentence in a cause of jactitation has been received upon a trial in ejectment as evidence against a marriage, and in like manner in personal actions, immediately founded on a supposed marriage. So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture. But in all these cases the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence and had acquiesced under it, or claimed under those who were parties and had acquiesced.(c)

In *Jones v. Bow*,(d) on a trial of ejectment at bar, the question being whether C. was married to J., under whose issue the plaintiff claimed, and the defendant offering by way of anticipation of the plaintiff's evidence of the marriage, and to prevent his giving any evidence, a sentence of the arches in a suit of jactitation of marriage, decreeing that there was no marriage, the whole court upon debate held, that such sentence whilst unrepealed was conclusive against all matters precedent, and that the temporal courts must give credit to it, being of spiritual cognizance.(e)

A sentence in a cause of jactitation was received as conclusive evidence against the plaintiff in an action for seducing his wife, though the sentence was not pronounced till after the issue joined in the action at common law.(f) And a similar sentence was held conclusive against a contract of marriage in an action for damages founded [ \*471 ] on the breach of \*such contract.(g) By conclusive is meant that the court will not receive evidence to contradict it. It is a general rule that wherever a matter comes to be tried in a collateral way, the decree, sentence or judgment of any other court having competent jurisdiction, shall be received as conclusive evidence of the matter so determined. The temporal courts must take notice of the forms of sentence in the ecclesiastical courts. And though a party, notwithstanding a sentence in a suit of jactitation, might at any time have sued for restitution of conjugal rights, such sentence is conclusive in collateral actions, until it is reversed or overturned by some other sentence.(h) If a proper suit has been instituted in the ecclesiastical court in relation to the validity of a marriage in the lifetime of the pretended husband, and a sentence is given against the marriage, it will bind every body, because it is final and

(c) *Do Grey, C. J. Duchess of Kingston's case*, 20 How. St. Tr. 540. temp. Hardwicke, by Lee, 11.

(d) Carth. 225.

(e) See *Kenn's case*, 7 Rep. 41; Cro. Jac. 186.

(f) *Clews v. Bathurst*, 2 Str. 960; *Casea*

(g) *Da Costa v. Villa Real*, 2 Str. 961.

(h) *Meadows v. Duchess of Kingston*, Ambl. 761; *Clews v. Bathurst*, Str. 960; *Da Costa v. Villa Real*, ib. 961.

conclusive; as being the proper jurisdiction in civil cases, unless the question of marriage be merely an incidental point relating to the grant of letters of administration.<sup>(i)</sup> Although the *de facto* husband was not party to the suit, nor to the sentence of the spiritual court which dissolved the marriage between him and the woman, but the woman only, yet the sentence against the wife being but declaratory was held to be good, and to bind the husband *de facto*.<sup>(k)</sup> So where a party had issue by his wife *de facto*, and after a sentence of nullity of marriage married another woman, it was held that so long as the sentence of nullity stood unreversed, that the issue of the first marriage was illegitimate.<sup>(l)</sup> It was said that a sentence of divorce for consanguinity or affinity would have been conclusive evidence to bastardize the children born in wedlock before the divorce.<sup>(m)</sup>

*Sentences on collateral matters.*—The sentence of the ecclesiastical court is not conclusive unless the matter in issue \*has [ \*472 ] been directly determined by it. Thus, in an action of trover the plaintiff proved the goods to be in his possession, and to have been taken away by the defendant, who showed that they belonged to J. B. in her lifetime, and that the defendant was entitled to them as her administrator. Upon this the plaintiff proved that some few days before her death she was actually married to him, whereupon the defendant insisted that the spiritual court had determined the right to be in him by the grant of letters of administration, which negated the existence of the alleged marriage. But Holt, C. J. held that the grant of the letters of administration was not conclusive upon the point, that the plaintiff was not the intestate's husband, which was not directly determined by the grant of administration, although it would have been otherwise if the question of marriage on the grant of the letters of administration had been tried and decided.<sup>(n)</sup> The sentence of the ecclesiastical court in a criminal suit for fornication is not evidence against the legitimacy of the issue of the party claiming by descent, because the point of marriage was not decided.<sup>(o)</sup>

*The Effect of Sentences in Criminal Matters.*—But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration; first, because the parties are not the same; for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend or examine witnesses, in any manner intervene, or appeal; secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.<sup>(p)</sup> The statute 1 Jac. 1, c. 11, which

(i) *Baker v. Pritchard*, 2 Atk. 388; *Roach v. Garvan*, 1 Ves. sen. 159; see *Brownsword v. Edwards*, 2 Ves. sen. 245; *Montagu v. Maxwell*, Vin. Abr. tit. Executors, 65, pl. 9.

(k) *Bunting v. Lepingwell*, 4 Rep. 296.

(l) *Kenn's case*, 7 Rep. 41.

(m) *Hilliard v. Phaley*, 8 Mod. 182.

(n) *Blackham's case*, Balk. 290; *Roach v.*

*Garvan*, 1 Ves. sen. 159; *Brownsword v. Edwards*, 2 Ves. sen. 245; *Thompson v. Donaldson*, 3 Esp. 63.

(o) *Hilliard v. Phaley*, 8 Mod. 180; *Brownsword v. Edwards*, 2 Ves. sen. 243.

(p) *De Grey, C. J. Duchess of Kingston's case*, 20 How. St. Tr. 540, 541.

[ \*473 ] made polygamy \*a felonious offence, and for the trial of such offence necessarily gave to the temporal courts a cognizance of the lawfulness of marriage, provided that the act "shall not extend to any person divorced by a sentence in the ecclesiastical court, nor to any persons where the former marriage has been by the ecclesiastical court declared null and void." By this statute there were two cases in which the sentence of the ecclesiastical court will protect against the criminal inquiry, namely, the case of a sentence of divorce, and the case of a sentence of nullity of marriage.(q) But the statute made no exception in favour of a sentence in a cause of jactitation; and as such a sentence is not conclusive even in the court where it was delivered, and declares not directly but only collaterally the invalidity of marriage, it has been adjudged not to be a bar to a criminal prosecution. In the case of the *Duchess of Kingston*, who was tried for polygamy, a sentence in the ecclesiastical court against the validity of a former marriage, in a suit of jactitation of marriage, was produced in evidence on her behalf, and contended to be conclusive, being unappealed from. But first it was holden not to be conclusive in itself, the sentence having decided on the invalidity of the marriage only collaterally, and not directly. But further, admitting it in general to be conclusive, yet the effect of it might be avoided by showing that it had been obtained by fraud or collusion; and she was declared guilty.(r)

A sentence of divorce *a mensa et thoro* was a sufficient answer to an indictment for bigamy, under the 1 Jac. I. c. 11.(s) But the stat. 9 Geo. 4, c. 31, s. 22, is differently worded, and does not seem to include such a divorce, for it declares that the penal consequences of bigamy "shall not extend to any person who at the time of the second marriage shall have been divorced from the bond of the first marriage, or whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."(t)

[ \*474 ] It seems that the question as to the validity of a marriage \*may be entertained in the ecclesiastical court, notwithstanding a conviction for bigamy.(u)

We have already adverted to the weight which will be attached to the sentence of a foreign court on a question of marriage.(x) Where the marriage was contracted in Denmark, between parties who were both domiciled there, and afterwards dissolved by an ordinance of the king of Denmark, and it was established by the evidence of Danish lawyers that by the law of that country the king can grant a divorce *a vinculo matrimonii*, and that such a dissolution is valid, administration was granted to the widow of a subsequent marriage, the court not deciding how far it would have been effectual in a matrimonial cause, where both the burthen and nature of the proof is different.(y) But it was decided by the Court of Chancery that a sentence of divorce pronounced in Denmark cannot defeat the rights acquired by parties under a marriage solemnized in England.(z)

(q) 1 East P. C. 467.

(r) *Duchess of Kingston's case*, 20 How. St. Tr. 355.

(s) *Middleton's case*, Kelyng, 27; 1 East's P. C. c. 12, s. 4.

(t) *Ante*, pp. 225-227.

(u) *Ante*, pp. 230, 231. See *Boyle v. Boyle*, 3 Mod. 164; Bull. N. P. 245.

(x) *Ante*, pp. 143, 150.

(y) *Ryan v. Ryan*, 2 Phill. R. 332.

(z) *McCarthy v. Deear*, 2 Russ. & M.

*Sentences not Final.*—A sentence touching the *validity* of a marriage never becomes a final judgment, but is always open to revision and reversal. But so long as it is unrepealed it is conclusive evidence against all persons who were bona fide parties to that adjudication.(a)

Where a marriage is declared to be void by the statute law, the sentence of the ecclesiastical court in favour of the marriage will not legalize it, but leaves it open to be questioned in any other court, where any question of property depending upon it may arise.(b)

*\*Sentences impeachable for Fraud.*—The effect of a [ \*475 ] sentence of the ecclesiastical court may be avoided by proof that it was obtained by fraud or collusion.(c) A distinction has been taken between the case of a stranger who cannot come in and reverse the judgment, and therefore must of necessity be permitted to aver that it was fraudulent, and the case of one who is a party to the proceedings; the party himself cannot give evidence of it, but must apply to the court which pronounced the sentence to vacate it. Thus in an action of assumpsit, the defendant gave in evidence her marriage with one M.; in answer the plaintiff produced a sentence in the ecclesiastical court, showing that at the time of such alleged marriage the defendant was married to another person, which the plaintiff relied on as conclusive evidence of the nullity of the marriage with M. The court, however, would not allow the defendant to prove that the sentence was obtained by fraud.(d) Fraud in obtaining a sentence can only be examined in the court where the fraud was committed, or in one of concurrent jurisdiction; and courts of equity have not concurrent jurisdiction in questions of marriage; and the court of chancery would not enter upon the question of fraud in obtaining a sentence of jactitation of marriage.(e)

## 2. OF THE EFFECT OF SENTENCES OF DIVORCE.

*Power to contract another marriage.*—Where a marriage is declared by the ecclesiastical court to be null and void for some cause existing prior to the marriage, the parties are of course at liberty to contract a second marriage.(f) The sentence declaring a

514, cited 3 Hagg. Eccl. R. 612. See *Shute v. Shute*, Pr. Ch. 111; *Pettifer v. James*, Bunb. 16.

(a) *Duchess of Kingston's case*, St. Tr. vol. xx. p. 543; Com. Dig. Baron and Feme, (C. 6). See Hargrave's Law Tracts, 471.

*Sententia in causâ matrimonii non transit in rem judicatam, sed revocatur quodocunque error detectus fuerit, sed ut hoc exactius declaretur, distinguendum est, utrum sententia lata sit contra matrimonium, an vero pro matrimonio. Primo casu nunquam, ut dictum est, transit in rem judicatam; secundo casu distinguendum, utrum sententia lata sit pro matrimonio, quod tamen obstante aliquo impedimento canonico ut puta quia in*

*gradu prohibito contractum, subsistere non potest, et tunc similiter non transit in rem judicatam.* Gail. Obs. lib. i. Observ. 112. See 1 Hagg. Cons. R. 220.

(b) *Bouzer v. Ricketts*, 1 Hagg. Cons. R. 214.

(c) *Duchess of Kingston's case*, 20 How. St. Tr. 544. 478, 479; *Roach v. Garvan*, 1 Ves. Sen. 157. 287. See *Bandon v. Beecher*, 3 Clark & Fin. 510.

(d) *Prudham v. Phillips*, cited Ambl. 473; 20 How. St. Tr. 470, n.

(e) Ambl. 762.

(f) *Bury's case*, Dyer, 179 a; 5 Rep. 98 b; ante, p. 203; 3 Burn's Eccl. L. 113; 3 Inst. 88, 89.

marriage void pronounces the party to be free from the bond of marriage with the particular individual, and to have full liberty to contract and solemnize legal marriage with any other person. We have already seen that persons divorced *a mensa et thoro* for adultery or cruelty cannot marry again whilst the former husband or wife is [ \*476 ] alive,(g) \*and if they do, such marriage is void. When a marriage was dissolved either for adultery or wilful and malicious desertion, it was universally admitted by the Protestant states of Europe that the innocent party might again marry, but the guilty party, it has been said, could not marry so long as the innocent party remained unmarried.(h) There seems to be no law by which this proposition is established. The prohibition, which does exist, prevents the guilty party from marrying the person with whom the adultery was committed.(i)

*Marriage after Parliamentary Divorce.*] Parliamentary bills of divorce usually declare that the bond of matrimony between the parties shall be wholly dissolved, annulled, vacated, and made void to all intents and purposes whatsoever. But express authority to contract a new marriage is given only to the injured party, making it lawful for such party to marry again, and declaring that the children born in such matrimony shall be legitimate. There is no similar provision for the future marriage of the offending party. It seems more than probable that in the early instances of these divorces, it was not supposed or adverted to, that the permission to contract a new marriage could extend to the adulteress. But the subsequent and long acquiescence seems to have established such marriages, or at least entitled them to be established, if any doubt should arise respecting their validity. It is indeed difficult to understand how a marriage can be dissolved as to one of the parties, without being equally dissolved as to the other. And perhaps it may be concluded that divorce bills, as now worded, though purporting only to relieve the injured party, are a complete dissolution of the marriage; of which dissolution the adulteress may legally avail herself, unless expressly prohibited by some act of the legislature.(k) This point was much discussed in the house of lords in the year 1800, and although the preponderating opinion seemed to be in favour of the validity of the marriage between the guilty parties, yet some of the speakers entertained doubts upon the subject.(l)

[ \*477 ] *\*Woman Divorced not liable to be sued as a Feme Sole.*] —A man and his wife cannot, by agreement between themselves, change their legal capacities and characters, nor can a woman be sued as a feme sole while the relation of marriage subsists, and she and her husband are living in this kingdom.(m) A feme covert cannot be sued alone, unless in the known excepted cases of abjuration, exile, and the like, where the husband is considered as dead, and the woman as a widow, or else as divorced *a vinculo*.(n)

(g) Ante, pp. 374–376; Com. Dig. Baron and Feme, (C. 5.)

(h) See authorities cited, 1 Burge on Foreign Law, 649, n. (b).

(i) 1 Burge Foreign Law, 649; ante, p. 374.

(k) Lord Auckland, Parl. Hist. vol. xxxv. 247; ante, p. 378.

(l) Parl. Hist. vol. xxxv. p. 287–300.

(m) *Marshall v. Rutton*, 8 T. R. 545.

(n) *Hatchett v. Baddeley*, 2 Bl. R. 1082; *Hyde v. Price*, 3 Ves. 443; *Loon v. Schutz*,

A divorce for adultery does not destroy the relation of marriage, but merely suspends for a time some of the obligations arising out of that relation. A sentence of divorce *a mensa et thoro* does not so far destroy the relation of husband and wife as to make the latter a feme sole, such a sentence merely suspends for a time some of the obligations arising out of that relation. A woman divorced *a mensa et thoro* for adultery, and living separate and apart from her husband, cannot be sued as a feme sole.(o)

*Jewish Divorce.*—On the trial of a plea of coverture Lord Kenyon appears to have admitted a divorce in a foreign country according to the custom of the Jews there.(p) We have already seen(q) that Jews have their own rites of marriage. In a recent case, where a personal action was brought by a married woman, who had been divorced from her husband according to the forms of the Jewish law, on the ground of incompatibility of temper, the question as to her right to maintain the action was reserved.(r) A Jewish divorce cannot be proved without producing the document of divorce delivered by the husband to the wife. In the course of a trial of an action of assumpsit, brought by a woman, it appeared that she had for several years before cohabited with a man as her husband, from whom she had separated. The plaintiff's counsel, however, undertook to show that the marriage of the plaintiff was a marriage in which both the parties were Jews; that it had been solemnised according to the Jewish ritual, and had been put an end to by a Jewish divorce before the period of the contract declared upon. For this purpose Doctor Solomon Hirschel, chief rabbi (commonly called high priest) of the German Jews in England, and other subordinate officers of the synagogue were called. The book of divorces, kept by the superintendent of the synagogue in Brooke's Gardens, containing an entry of the divorce in Hebrew, was produced by the superintendent, who was present at this divorce; but it also appeared from the evidence of Dr. Hirschel, to constitute a valid divorce, under the laws and usages of the Jews, a written document of divorce(b) must be delivered from the husband to the wife; and that the delivery of this document is the operative part of the ceremony, which must however take place in the presence of the high priest and of ten persons at least. This document of divorce, which is attested by two witnesses, may be retained by the wife, but it is more frequently handed over by the wife to the high priest. This document was not produced by the plaintiff and the high priest stated that he had not been requested to bring it with him. Upon this evidence, it was contended for the defendant, first, that although Jewish marriages are excepted out of the marriage act, yet by the common law a marriage, whether Jewish or Christian, if once validly contracted, can be dissolved only by act of parliament, and

2 Bl. R. 1195. See *Kay v. Pienne*, 3 Camp. 123; *Farrer v. Granard*, 1 N. R. 80; *Jones v. Smith*, 2 Jarist. 469.

(o) *Lewis v. Lee*, 3 B. & C. 291. See *Hatchett v. Baddeley*, 2 Bl. R. 1082; *Hyde v. Price*, ib. 1195; *Lean v. Schutz*, 3 Ves. 443.

(p) *Ganer v. Lanesborough*, 1 Peake's R. 25; ante, p. 150.

(q) Ante, p. 67; *Jones v. Robinson*, 2 Phill. R. 335.

(r) *Moss v. Smith*, Common Pleas, Feb. 5, 1840; see Godolp. Abr. p. 497.

(b) See Matth. ch. v., v. 31, Matth. ch. 19, v. 7, Mark, ch. x. v. 4, Deut. xxiv. See the form of a Jewish bill of divorcement, Selden, Uxor. Ebraica, lib. 3, cap. 24.

that, supposing a Jewish divorce to be capable of effecting a dissolution of the marriage, yet, in the absence of the document of divorce, there was no evidence that any divorce had taken place. Erskine, J. was of opinion that a divorce had not been established.(c)

After sentence of divorce *ab initio*, the liability of a husband for the debts of his wife does not continue.(s)

*Rights of Property how affected by Divorce.*—Where the marriage [ \*478 ] is void *ab initio*, the husband acquires no right over \*the property of the wife.(t) It is said that in case of a divorce the wife shall have back any goods undisposed of which were given to her by her father in marriage.(u) But this clearly applies only where there was nullity of marriage *ab initio*, so as to be in reality no marriage.(x) The husband may release a legacy given to his wife notwithstanding a divorce. The wife obtained a sentence of divorce on account of the husband's adultery, the wife sued in the spiritual court for a legacy given to her, in answer the release of the husband after the divorce was pleaded, and the court held that inasmuch as the sentence did not avoid the marriage absolutely, but that they remained husband and wife, that the release of the husband was effectual.(y) But the husband after a divorce cannot release costs awarded to the wife in a suit of defamation.(z) It is said that if the husband sells a term for years which he has in right of his wife, equity will grant an injunction.(a)

How far the title to dower or curtesy is affected by a divorce will depend upon the nature of the divorce, for if it be a dissolution of the marriage the rights consequent upon it will cease. But where the bond of matrimony is not dissolved these rights may continue; if however the divorce be consequent upon the wife's leaving her husband and living in adultery, we have already seen that her title to dower is forfeited.(b) A wife, after a divorce on account of cruelty, is dowable of her husband's lands.(c) Where a marriage is void the husband does not acquire a right to be tenant by the curtesy, yet if it be only voidable, and is not avoided during the life of the wife, the husband will be tenant by the curtesy, for no marriage can be avoided in the ecclesiastical courts after the death of either of the parties.(d) For the same reason if a marriage *de facto* be voidable by divorce, [ \*479 ] whereby \*the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*; yet if the husband die before any divorce, then, because it cannot afterwards be avoided, his wife *de facto* will be endowed.(e) If the husband alien his wife's lands and they be afterwards divorced *a vinculo matrimonii*, the wife, during the husband's life, may enter by virtue of stat. 32 Hen. VIII. c. 28.(f) Where a husband shall be living apart from his wife, either by mutual consent or by sentence of divorce, the Court of Common

(c) *Moss v. Smith*, 1 Mann. & Grang. Rep. 233, 234. Salk. 123, as to bastards.

(s) 1 Gow, N. P. Cas. 10.

(t) *Aughtie v. Aughtie*, 1 Phill. R. 203.

(u) Dyer, 13 a.

(x) Gibb. Cod. 335; see Cro. Eliz. 908;

*Cage v. Acton*, 1 Lord Raym. 521; 2 Inst.

32.  
(y) *Stephens v. Totty*, Cro. Eliz. 908; 1

(z) *Motteram v. Motteram*, Bulstr. 264; see *Chamberlaine v. Hewson*, 5 Mod. 70.

(a) Com. Dig. Baron and Feme, C. 5.

(b) See ante, p. 420.

(c) *Stowell's case*, cited Cro. Car. 463.

(d) 2 Burn's Ecc. Law, 458; post, p. 484.

(e) Co. Litt. 33 b.

(f) 8 Rep. 73 a.

Pleas may dispense with the husband's concurrence in any case in which his concurrence is required to the alienation of her lands by the act for abolishing fines and recoveries.(g) A fine levied by husband and wife remained in force notwithstanding the marriage between them should be dissolved by a divorce.(h)

If one grant lands with his daughter in frank marriage, or goods with his daughter in marriage, and after the marriage is dissolved and they are divorced; in this case the grant is now become of no force, *cessante causa cessat effectus*.(i) The children of a woman born during a separation from her husband under a divorce *a mensa et thoro*, are prima facie illegitimate, for a due obedience to the sentence will be presumed until the contrary be shown.(h)

## SECTION III.

## OF VOID AND VOIDABLE MARRIAGES.

Civil disabilities, such as a prior marriage,(l) want of age,(m) idiocy and lunacy,(n) make a marriage contract void *ab initio*, not merely voidable. These do not dissolve a contract already made; but they render the parties incapable of contracting at all; they do not put asunder those who are joined together, but they [ \*480 ] previously hinder the union; and if \*any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union; and therefore no sentence of avoidance is necessary.(o) Corporal infirmities render a marriage void, and a divorce granted for such a cause is *a vinculo*.(p) A marriage contracted under restraint, and by means of force and custody, is void.(q) There are other cases in which marriages will be void or voidable according to the circumstances attending them.(r) It seems that a marriage may be set aside on the ground of having been effected by the conspiracy of three or four persons having intoxicated another, and married him in that state.(s)

*Marriages void by Statutes.*—The provisions of the act 26 Geo. 2, c. 33, s. 11, making the marriages of minors by license void for want of consent, and to what extent such marriages have been rendered valid by the retrospective operation of the 3 Geo. 4, c. 75, have been already stated.(t) The latter act, however, does not give validity to marriages by banns prior to that statute, which were void by reason of an undue publication of banns.(u)

We have already considered the grounds of nullity depending upon the express provisions of the legislature. It will be necessary in this

(g) 3 & 4 Will. 4, c. 74, s. 91.

(h) 2 Roll. Abr. 20; 1 Preat. Conv. 256.

(i) Shep. Touch. 287, citing 20 E. 4 ult.; Dyer, 13, 126; Plowd. 58.

(k) *St. George's v. St. Margaret's*, 1 Salk. 123.

(l) Ante, p. 223.

(m) Ante, pp. 282—285.

(n) Ante, pp. 183—201.

(o) 2 Phill. R. 19.

(p) Com. Dig. Baron & Feme, (C. 3.); ante, pp. 201—208.

(q) *Harford v. Morris*, 2 Hagg. Cons. R. 436; ante, p. 214.

(r) See ante, pp. 185, 213—223.

(s) See ante, pp. 199, 200.

(t) Ante, pp. 289—299.

(u) Ante, pp. 254—255.



place merely to recapitulate such grounds. Marriages, which have been celebrated since the 1st November, 1823, the day on which the 4 Geo. 4, c. 76, came into operation, may be void for the following causes:

1. Where both parties knowingly and wilfully intermarry without due publication of banns.(x) The publication of the banns of a minor is void after open and public dissent of the parent or guardian at the time of publication.(y)

[ \*481 ] \*2. Persons knowingly and wilfully intermarrying without a license from a person or persons having authority to grant the same.(z)

3. Or knowingly or wilfully consenting to, or acquiescing in, the solemnization of such marriage by any person not being in holy orders.(a)

4. Knowingly and wilfully intermarrying in any other place than a church, or such public chapel wherein banns may be lawfully published.(b)

5. All marriages celebrated after the 31st August, 1835, between persons within the prohibited degrees of consanguinity and affinity, are absolutely void.(c)

By 6 & 7 Will. 4, c. 85, s. 42, after the last day of June, 1837, marriages of persons knowingly and wilfully intermarrying under the provisions of that act in any other place than—

1. The church, registered building, office or other place specified in the notice and certificate.

2. Or without due notice to the superintendent registrar.

3. Or without certificate of notice duly issued. When the issue of a certificate has been forbidden, the notice and proceedings thereon are void.(d)

4. Or without license in case a license is necessary under that act.

5. Or in the absence of a registrar or superintendent registrar, where his presence is necessary under that act.(e)

A marriage originally void must always continue so, whether sentence of nullity has or has not been obtained during the lifetime of the parties. Where a sentence of the ecclesiastical court is obtained

[ \*482 ] in such cases, it does not *dissolve* the \*marriage, inasmuch as no lawful marriage has taken place, it merely declares the fact of marriage to be a nullity.(f) In many cases, where the law makes a thing void for the benefit of the parties con-

(x) Ante, pp. 255-258.

(y) 4 Geo. 4, c. 76, s. 8, ante, p. 236. "*The effect of forbidding the publication of banns.* Lord Brougham said, that he had taken pains to inquire, both from bishops and priests, what would be the consequence in their practice if, upon publication of banns, a person were to interpose and forbid the banns, or afterwards to forbid the marriage, which may be done at the altar, when the marriage is about to be solemnized. The answer they have given is, I should suspend the solemnity till I made inquiry. But suppose the person forbidding should say, I give no reason, but I only forbid the banns; or

suppose he gave another reason, that he was the rival of the husband, or that she was a rival of the lady; a very good reason for the party not wishing the marriage to take place, but no legal objection to the marriage, the answer is, that he would not be attended to at all." 1 Mac. & Rob. 305. See ante, 265.

(z) Ante, 263-265.

(a) 4 Geo. 4, c. 76, s. 22, ante, 270.

(b) Id. ibid.; ante, pp. 325-342.

(c) 5 & 6 Will. 4, c. 54, ante, pp. 154-157.

(d) 6 & 7 Will. 4, c. 85, s. 9, ante, p. 275.

(e) Ante, p. 281.

(f) See post, sect. 5.

cerned, they may waive such advantage if they please. *Quilibet potest renunciare juri pro se introductio.*(g) But the marriage acts, in declaring marriages void, are made against both the contracting parties, as well as the innocent children, so that an irregular celebration, without banns or license, makes the marriage void, even though the parties are willing to acquiesce in the marriage, and should afterwards agree to it.(h)

*Distinction between Void and Voidable Marriages.*—The temporal courts recognize the distinction between voidable marriages and marriages void *ab initio*; the former are esteemed valid to all civil purposes, unless sentence of nullity is actually declared during the lifetime of the parties; and consequently, after the death of one of the parties, the issue cannot be bastardized, but the latter is a meretricious and not a matrimonial union; no sentence of avoidance is necessary, and the issue may be bastardized after the death of one or both the parties, by proving that the supposed marriage was void *ab initio*.(i) Thus a woman was libelled *ex officio* for adultery with a deceased person. She pleaded that they were married and had issue; it was replied that she had a former husband then living. A prohibition was prayed, alleging that the suit would have the effect of bastardizing the issue. But Holt, C. J. said, "the issue are bastardized without any proceedings, if the parents were never married; the ecclesiastical court shall not proceed to dissolve a marriage *de facto* after the death of either party, as in the case of consanguinity, pre-contract and the like; but in this case, if the replication be true, the marriage was *ipso facto* void," and no prohibition was granted.(k) So where a defendant pleaded in bar that at the time of executing a certain bond, \*she was wife to A. B. But the plaintiff [ \*483 ] proved that A. B. had a former wife living at the same time; and that the second marriage had been declared void in the spiritual court; judgment was given for the plaintiff. For by reason of the first marriage the second was *ipso facto* void, and the defendant therefore was *always a feme sole*; and the sentence of the ecclesiastical court was only declaratory of the nullity, for what was void from the beginning required no sentence.(l)

So the ecclesiastical court would not grant administration of the effects of a wife to her alleged husband, on the ground that the marriage was void on account of having been contracted with a person of unsound mind.(m) A large portion of the cases which have arisen upon the validity of marriages had been decided by the Court of Queen's Bench in cases respecting the settlement of paupers. In such cases orders unappealed against, or confirmed on appeal, have been held conclusive evidence on questions as to the marriage and legitimacy of the parties named in such orders.(n) By an order of removal, D. S., his wife and six children, were removed to the parish

(g) 2 Inst. 183; Wing. 483.

(h) *Chisham v. Preston*, 1 W. Bl. 192; Bull. N. P. 114; see Poynter, 157, 2d ed.

(i) *Philips v. Bury*, Skinn. 470; *Pride v. Earl of Bath*, 1 Salk. 120; *Hayden v. Gould*, ib. 119; Co. Litt. 244 a.

(k) *Hemming v. Price*, 12 Mod. 432.

(l) Cro. Eliz. 857.

(m) *Browning v. Reane*, 2 Phill. R. 69.

(n) *Rez v. Inhabitants of Woodchester*, Burr. S. C. No. 67; ib. No. 86; *Rez v. Inhabitants of Stockland*, Burr. S. C. No. 163; *Rez v. St. Mary Lambeth*, 6 T. R. 615.

of W., which order was confirmed on appeal. Subsequent to that confirmation the marriage of D. S. was dissolved by the decree of the ecclesiastical court for incest. W. D., a son of D. S., and his wife, but not named in that order, was subsequently removed to the parish of W. It was held, on an appeal against the second order, that evidence of that decree was admissible to negative the derivative settlement of the pauper, who was not named in the former order of removal, by showing that since the first order the marriage had become void *ab initio*, and that the pauper was illegitimate.(o)

*Voidable Marriages.*—Voidable marriages are such as are valid for all civil purposes, unless sentence of nullity be actually declared during the lifetime of the parties.(p) Originally by our law marriage by persons subject to canonical disabilities were not only void *ab initio*, but always continued \*so. Dr. Lushington said, [ \*484 ] “it has been truly stated that it was the interference of the common law courts, which, in such cases, prohibited the spiritual courts from bastardizing the issue after the death of one of the parties, that created the distinction—the very unnatural distinction—of voidable and void; for void is voidable *ab initio*.”(r) The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities,(s) only make the marriage voidable, and not ipso facto void until sentence of nullity be obtained.(t)

We have already seen that formerly marriages within the prohibited degrees were voidable only, and that the law on this subject has been altered in some important particulars. Marriages solemnized before the 31st of August, 1835, within the prohibited degrees of *consanguinity*, remain voidable during the lives of both parties.(u) A voidable marriage continues a marriage till it is dissolved.(x) The ecclesiastical courts have cognizance to punish persons marrying within the Levitical degrees;(y) and may proceed to dissolve marriages which are voidable on the ground of being within those degrees.(z) But after the death of one of the parties no suit can be prosecuted in the spiritual court for avoiding a marriage. And if such court do proceed to call a marriage in question after the death of either of the parties, the courts of common law will prohibit such suit so far as relates to avoiding it, because it tends to bastardize and disinherit the issue, who cannot so well defend the marriage as the parties themselves when living might have done.(a) Therefore where a man had married his wife's sister, the ecclesiastical court cannot proceed to bastardize the issue after the death of either of the parties, on the ground that the marriage was incestuous, although the second wife died pending the suit, but the party may be punished for in-

(o) *Reg. v. Inhabitants of Wye*, 7 Ad. & Ell. 761.

(p) 2 Phill. R. 19.

(r) *Ray v. Sherwood*, 1 Curteis, 188.

(s) Ante, p. 201-213.

(t) 2 Phill. R. 19-21.

(u) 5 & 6 Will. 4, c. 54; ante, pp. 155—157.

(x) *Bury's case*, 5 Co. 98; Mo. 225; 2 Dyer, 179 a; 2 Leon. 169 Noy, 72; 1

And. 185; Jenk. 258.

(y) *Harrison v. Burwell*, 2 Vent. 22.

(z) *Wortley v. Watkinson*, 2 Show. 71; Holt, 457; 1 Mod. 156.

(a) 3 Bl. Comm. 93; 1 Bl. Comm. 431; *Brownword v. Edwards*, 2 Ves. sen. 245; *Kenn's case*, 7 Rep. 43 b; Co. Litt. 244 a; Salk. 151. 548; 4 Mod. 162; Comb. 200; 1 Brownl. 42; Moore, 228.

cest.(b) So where a marriage was \*had between parties within the prohibited degrees, and such marriage, though [ \*485 ] voidable, had not been declared void in the lifetime of the parties, the husband remained husband to all civil purposes, and is clearly entitled to the administration of his wife's effects.(c) Although a sentence of divorce cannot be pronounced after the death of the parties, yet a sentence of divorce may be repealed in the spiritual court by a suit there after the death of the parties.(d) But it is said that a divorce by sentence cannot be re-examined after the death of the parties.(e)

#### SECT. IV.—OF THE MODE OF PROCEEDING IN THE ECCLESIASTICAL COURTS.

*Jurisdiction of the Ecclesiastical Courts.*—]The proceedings in the ecclesiastical courts are regulated according to the practice of the canon and civil laws; or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law. For if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which, upon principles of sound policy, the ecclesiastical process ought in every state to conform (as if they require two witnesses to prove a fact, where one only will suffice at common law,) in such cases a prohibition will be awarded against them.(a) So many important alterations in the present constitution and jurisdiction of the ecclesiastical courts have for some time been contemplated by the legislature as to render it expedient to defer for the present an enumeration of the ecclesiastical courts.(b) It is probable that in conformity with the recommendation of the \*commissioners on ecclesiastical courts in England and [ \*486 ¶ Wales, and the debates in parliament, that the jurisdiction of the inferior ecclesiastical courts will be abolished; and that a court will be established, having jurisdiction throughout England and Wales of all matrimonial causes.(c)

We have already adverted to the jurisdiction of the ecclesiastical courts to decide upon the validity of foreign marriages.(d) In matrimonial causes the power of the court is in personam, and depends upon the locality of the person cited. Though a defendant may usually reside out of the kingdom, yet if he is served with a citation within the jurisdiction of an ecclesiastical court in England, as that

(b) *Hicks v. Harris*, 4 Mod. 182; *Harris v. Hicks*, 2 Salk. 548.

(c) *Elliott v. Gurr*, 2 Phill. R. 16; see Co. Litt. 33 a.

(d) *Kenn's case*, 7 Rep. 44 b.

(e) Com. Dig. Baron and Feme, (C. 6).

(a) 3 Bl. Comm. 100; see ante, p. 465. Since the stat. 1 Will. 4, c. 70, the first day of each term in the courts at Doctors' Commons continues to commence as theretofore

on the day on which such term commences in the courts of common law.—Order, 14th Feb. 1832, 3 Hagg. Eccl. R. 655.

(b) See 3 Bl. Comm. 61—67; 2 Bac. Abr. Eccl. Courts; Report of Ecclesiastical Commissioners, 1832, pp. 11, 12.

(c) Hans. Parl. Deb. vol. xxv. p. 806; Hans. Parl. Deb. vol. xxxi. 3 Ser. pp. 323—330; ib. vol. xlvi. pp. 522—548.

(d) Ante, pp. 130, 131.

of the Consistory court of London in a suit for nullity of a marriage, that court has jurisdiction to try the validity of the marriage wherever it might have been contracted.(e) Damages cannot be recovered in the ecclesiastical courts, but costs only.(f) But the penance enjoined in a *private* suit may be commuted or dispensed with for money paid to the complainant.(g)

A court of limited jurisdiction as that of an archdeacon, bishop, or archbishop, on the plainest principle of the common law, can have no jurisdiction beyond its local limits. Both the canon(h) and the statute law forbid the citing of parties out of their dioceses or peculiar jurisdictions. The statute 23 Hen. 8, c. 9, was made with the view of enforcing that principle, and imposed a penalty and forfeiture for citing persons out of the diocese where they resided at the time of the issuing the citation. This statute was made for the benefit of the subject, which it hath been held to provide for sufficiently by giving defendants who are so cited a privilege of pleading to the jurisdiction. Consequently, if a party who is so cited once waive that privilege, by appearing and submitting to the suit, such party is bound to the jurisdiction.(i) It is not \*competent to the ecclesiastical court [ \*487 ] to compel persons resident without their jurisdiction to answer to a citation in a matrimonial cause; and if upon the face of the citation it appears that the party was resident in Ireland, out of the jurisdiction of the consistorial court, then it is perfectly clear that whatever that court may do in the suit, may at any time, even after any sentence, be reversed, in respect of the want of jurisdiction, apparent on the face of the record.(k) But it is not competent to a party only cited to see proceedings in a marriage suit, to object to the jurisdiction on the ground that the party proceeded against has been unduly cited. Thus in the case of the *Marquis of Donegal v. The Marchioness of Donegal*: C. against whom a decree to see proceedings in the cause had been directed, applied for a prohibition to restrain the judge of the Consistorial court of London from proceeding in a suit of nullity of marriage, instituted by the marquis against the marchioness. One ground for prohibition was that the marchioness had been constantly residing in Ireland for the last four years, out of the local jurisdiction of the court. But the vice-chancellor refused the prohibition, observing that the writ of citation against the marchioness described her as resident in the parish of St. James, Westminster. If it had been directed to the marchioness as living in Ireland, then on the face of the record it was clear that the court had no jurisdiction in the case. She might, if she had chosen, have objected that she was living in Ireland, and consequently was not resident within the jurisdiction of the court; but she did not think fit to do so, but appeared and pleaded to the citation. This then was an admission on her part that she was properly described as living in the parish of St. James, Westminster, and he was bound to say, that having once pleaded

(e) *Morse v. Morse*, 2 Hagg. Eccl. R. 610; *Donegal v. Donegal*, 3 Phill. R. 611. 588; 6 Madd. 375; *Hurford v. Morris*, 2 Hagg. Cons. R. 425.

(f) *Watson*, c. 30; Burn's Eccl. L. tit. Courts, 50, 51.

(g) 5 Mod. 70.

(h) Canon, 106; Gibs. Cod. 1004. 1008.

(i) 1 Addams, 17; Hetley, 19; 1 Ventr. 61; Carth. 33; Show. 161, &c.

(k) *Donegal v. Donegal*, 3 Phill. R. 599.

to these facts, she had no right to withdraw from them at any time before sentence was pronounced. If the marchioness could not retire being concluded herself, she had also concluded an intervening party. The jurisdiction of the ecclesiastical court depended not on the locality of the subject, but on the locality of the person. How then were the interests of C. to \*be prejudiced by the proceedings [ \*488 ] being instituted in London, instead of Ireland? His honour was therefore of opinion, on authority and principle, that the marchioness was now precluded from objecting, having submitted to the jurisdiction, and that C. was bound by her submission.(l) It is a general principle, as well in courts of equity as in courts of law, that a party admitting a fact, which does give jurisdiction to a court, and appearing and submitting to such jurisdiction, can never recede, or as it is called in the Scotch law, resile from those facts and withdraw that admission.(m) It may be questionable whether a citation of the wife at the domicile of the husband, is not sufficient to found the jurisdiction of the court even in a suit of nullity of marriage against the wife, wherever the wife may be actually resident.(n) A party may have two domiciles, the one actual the other legal: and prima facie at least, the husband's actual is the wife's legal domicile, wheresoever the wife may be personally resident. Upon the principle of the domicile of the husband being the legal domicile of the wife, it seems that the citation of the wife at the domicile of the husband is clearly sufficient to found the jurisdiction of the ecclesiastical court in a suit for separation *a mensa et thoro*, by reason of adultery, the wife being fixed with notice of the suit.(o)

Where the court has clearly no jurisdiction, it will not suffer the parties to proceed and to incur unnecessary expense, it will stop without waiting for an injunction; but if the point be at all doubtful, the court will be bound to proceed, for to refuse the exercise of a jurisdiction, which is competent to entertain the suit, and to which a party applies, is a sort of denial of justice.(p)

*Of the Citation.*—The mode of commencing the suit and bringing the parties before the court, is by a process called a citation, or summons, containing the name of the judge, the plaintiff and the defendant, the cause of action, and the time \*and place of ap- [ \*489 ] pearance. This citation, in ordinary cases, is obtained as a matter of course from the registry of the court, and under its seal.(q) but in special cases, the facts are alleged in what is termed an act of court, and upon those facts the judge or his surrogate decrees the party to be cited; to which, in certain cases, is added an intimation, that if the party does not appear, or appearing does not show cause to the contrary, the prayer of the plaintiff, set forth in the decree, will be granted.(r) This process is served by some respectable person, generally by the apparitor of the court, if the distance will allow, (that is if the parties reside within twenty miles of London,) by showing the original, under the seal of the court, and

(l) *Donegal v. Donegal*, 3 Phill. R. 586.

(m) *Ib.* 608, 609. See Carthow, 33.

(n) *Chichester v. Donegal*, 1 Addams, 19; R. 536.

6 Madd. 375; *Warrender v. Warrender*, 2 Cl. & Finn. 483

(o) 1 Addams, 19, n.

(p) *Grignion v. Grignion*, 1 Hagg. Eccl.

R. 536.

(q) Consett 27.

(r) 3 Hagg. Eccl. R. 11.

delivering a correct copy of it to the defendant. A certificate of the service is endorsed on the citation, verified on oath by the person who has served it, and returned to the registry. Should the parties however reside beyond twenty miles from London, it is customary to send the original citation or decree, &c. to a solicitor or other person residing in the immediate neighbourhood where the party to be cited lives or is remaining, who can effect the service thereof in the manner above stated; certifying on the back of the original the execution of the instrument, which he verifies by an affidavit sworn before a master extraordinary in chancery.<sup>(s)</sup> If the person to be served cannot be found, a return to that effect is made and certified, and a citation *viis et modis*, by ways and means, or a compulsory citation, may issue, to be served personally if possible, otherwise on the door of the last residence of the party, or upon the door of the parish church, if he has no longer any known residence. If an appearance is not obtained in this citation, the party is put in contempt, and the proceedings may be conducted *ex parte*, or *in penam contumaciæ*, as hereafter stated.<sup>(t)</sup> The distinction between this service *viis et modis* and personal service is, that the latter may conclude both the party and the court; but the former is a constructive service, and concludes the party, but does not conclude the court.

[ \*490 ] The court on good and sufficient \*grounds may open the proceedings to get at the substantial justice of the case.<sup>(u)</sup>

The common practice is for the proctor, who extracts the citation, duly signed and sealed, to translate the heads of it, or shortly to explain its meaning in English, which summary is called the English Note, and is delivered to the mandatory, with the original citation. The citation or mandate thus delivered is considered to have been duly executed, when the mandatory has shown it, under the seal of the official, to the party summoned; and instead of a copy of the citation, as in former times, he is only required to leave with the party the above-mentioned note in English.<sup>(v)</sup> If a party cited asks for a copy of the citation, the mandatory is bound to give him one, on payment of sixpence, if it be a common or ordinary citation. But if it be an extraordinary citation, containing an inhibition or intimation, and therefore of necessity more lengthy and voluminous, then the party cited must pay twelve pence for the copy.<sup>(x)</sup> A citation may be served on a Sunday, or according to the custom of the ecclesiastical court, it may be fixed to the church door on a Sunday; and this shall not be said to be restrained by the stat. 29 Car. II. c. 7, which prohibits the serving of any process whatever upon a Sunday, except in cases of treason, felony, or breach of the peace.<sup>(y)</sup> When the person is beyond the sea, the usual mode of publishing the citation by proclamation, was by affixing the decree on one of the pillars of the royal exchange.<sup>(z)</sup> In all cases of process served on a minor,

(s) 4 Chitty's Pr. 137.

(t) See post, p. 492; Rep. Eccl. Comm. 14, 15; 1 Phill. 176; 2 Hagg. Cons. R. 263. 369.

(u) *In bonis*, Robinson, 3 Phill. R. 512.

(v) *Law Eccl. Forms*, 92.

(x) *Ibid.*

(y) 5 Mod. 449; Carth. 504; Lord Raym. 706; arg. 12 Mod. 275; Bac. Abr. Eccl. Courts (E).

(z) 1 Hagg. Eccl. R. 55. See 1 Phill. 175, 176; post, 500.

the court requires a certificate of its having been served in the presence of the natural or legal guardian of the minor; or, at least in that of some person or persons upon whom the actual care and custody of the minor for the time being has expressly devolved.(a)

A party in custody for debt may be cited.(b) The cause for which the citation is issued should be correctly stated.(c) A variance between the citation and the sentence prayed is \*fatal. A [ \*491 ] citation issuing as "in a suit of nullity of marriage by reason of a former marriage," will not found a sentence of separation by reason of an undue publication of banns, the woman being therein described as spinster, the first husband having died subsequently to the publication of the banns, but prior to the marriage.(d) But it is not a good objection, that if there be two charges in the citation, only one is subsequently proceeded on; nor that a part of the general charge only is proceeded on, if the charge be in itself divisible.(e) Thus where the original citation was by a wife against her husband for a divorce by reason of cruelty, which was returned on the second session of the Michaelmas term, 1826. On the admission of the libel the cause was appealed, and on the by-day after Trinity term, 1827, the appeal was pronounced against; but the court, at the petition of both proctors, retained the cause. The husband afterwards confessed the marriage, but otherwise gave a negative issue, and the wife was assigned to prove the issue; it was afterwards moved to add articles to the libel, pleading acts of adultery subsequent to the commencement of the suit. The court said "the only question was, whether a fresh citation was necessary, the husband being already before the court; and that as no distinction existed between the one proceeding and the other, in order to save useless expense, the articles should be received, though the original citation was for cruelty only."(f) In *Popkin v. Popkin*,(g) Lord Stowell inclined to think that, under a citation for adultery, facts of cruelty could not be pleaded, nor vice versa. A mere misnomer of the parish of the party cited, unless out of the jurisdiction, is not fatal, if the court can collect with certainty that he is the party intended, and that there is no danger of proceeding against a wrong person.(h) A misnomer is cured by appearance. A party alleging a misnomer is bound to assign the name by which he means to abide.(i)

*Of Appearance.*—The party cited may either appear in person or by his *proctor*, who is appointed by an instrument \*under [ \*492 ] hand and seal, termed a *proxy*. The proctor thus appointed represents the party, acts for him, and manages the cause, and binds him by his acts.(j) By the practice of these courts, if the party himself come into court, and do any act himself, he thereby vacates a power given to another to act for him.(k)

(a) *Cooper v. Green*, 2 Addams, 454.

(b) *Butler v. Dolben*, 2 Lee, 312.

(c) Conset. 25.

(d) *Wright v. Ellwood*, 2 Hagg. Eccl. R. 598.

(e) 2 Hagg. Cons. R. 172.

(f) *Barrett v. Barrett*, 1 Hagg. Eccl. R.

23.

(g) *Ibid.* 767.

(h) *Barham v. Barham*, 1 Hagg. Cons. R.

6-8.

(i) *Pritchard v. Dalby*, 1 Hagg. Cons. R.

187.

(j) Rep. Eccl. Comm. p. 15.

(k) 12 Ves. 346; 2 Chit. Pr. 482.



*Orders of the Court.*—The following orders of the court may be properly inserted in this place: (l)

3. That when a party shall have been duly cited, and shall not appear on the day assigned for his appearance, such party shall be pronounced in contempt, and the proceedings shall on the following court day, and afterwards, be carried on in pain of his consent,—“*in pœnum contumaciæ*.”

4. That where proceedings are carried on “*in pœnum contumaciæ*,” witnesses may be produced and sworn before a surrogate in his chambers as well as in open court, and such production shall be immediately entered and recorded in the register book: but the witness so produced shall not be repeated to his deposition until forty-eight hours at least shall have expired from the time of his production.

5. That the proctor of a party taking out a citation, or other process, shall on the day of its return be prepared to exhibit his proxy, and to proceed in the cause by taking the first step therein, according to the nature of the proceedings.

6. That any party who shall have been served with a citation, or other process to appear, and who shall appear on the day assigned therein, shall be dismissed with his costs, unless the party taking out such citation or process shall return the same, and be prepared to proceed in the suit, for which costs the proctor taking out such citation or other process shall be liable.

7. That a proctor appearing for a party cited shall be prepared with his proxy, and shall exhibit the same on entering such appearance.

8. That the proctor of a defendant in a matrimonial cause shall admit or deny the fact of marriage, under pain of suspension, on the same day that the plea alleging the marriage is admitted. (m)

[ \*493 ] *\*Appearing under Protest.*—A party appearing, and not intending to waive any objection to the jurisdiction of the court, should appear under protest with respect to the jurisdiction. (q)

In cases where some act is required to be done by the party cited, as, for instance, to pay *alimony*, the compulsory process is enforced; but in some cases, where no act is necessarily to be done by the party cited, the plaintiff may proceed *in pœnam contumaciæ*, and the cause then goes on *ex parte*, as if the defendant had appeared.

The party cited, to save his contumacy, may appear under protest, and may show cause against being cited; such as, that the court has no jurisdiction in the subject-matter, or that he is not amenable to that jurisdiction; this preliminary objection is heard upon petition and affidavits; and either the protest is allowed, and the defendant dismissed, or the protest is overruled, and the defendant is assigned to appear absolutely; and costs are generally given against the unsuccessful party.

Either party may appeal from the decision on this preliminary point; or the defendant, in case the judge decides against him on the

(l) 13 Feb. 1830; 2 Hagg. Eccl. R. Pro. See 10 Geo. 4, c. 53, s. 9.

face. See 10 Geo. 4, c. 53, s. 9.

(q) *Donegal v. Donegal*, 3 Phill. R. 606;

(m) *Orders of the Court*, 13 Feb. 1830. see 2 Addams, 140.

question of jurisdiction, and on some other questions, may apply to a court of law for a prohibition.(r)

A party appearing in court under protest, may be assigned "*to extend his protest*," that is, to state his grounds of exception to the jurisdiction of the court in a sort of informal plea, which is termed in the ecclesiastical courts "*an act of petition*." The object of which is, that the grounds of exception should be stated specifically and distinctly, so that both the court and the adverse party may be duly apprized of them, and in order that the latter may furnish, if in his power, a counter statement upon any matter either of fact or law.(s)

In a suit brought by the father of the party, who appeared under protest, counsel ought to be heard for extending the protest, before the party is directed to appear absolutely.(t)

\*In a suit by the husband for restitution of conjugal rights, appealed by the wife to the court of arches from [ \*494 ] the consistory court of London, in which it originally depended, on a grievance, the husband appeared to the usual inhibition of the court, not absolutely, but under protest, which disclosed an appealable grievance on the face of it, without at the same time so disclosing any peremption of the appellant's right to appeal therefrom, the court overruled such protest, and directed an absolute appearance.(v)

*Mode of enforcing Process.*—The powers of the ecclesiastical court were formerly very defective for enforcing their sentences, for which they had no other process but that of *excommunication*, by which the party incurred certain civil disabilities.(w)

The mode of enforcing all process, in case of disobedience, is by pronouncing the party cited to be contumacious; and if the disobedience continues, a *significavit* issues, upon which an attachment from chancery is obtained, to imprison the party till he obeys.

By stat. 53 Geo. III., c. 127, s. 1, excommunication, with the proceedings followed thereon, (except in certain cases specified in the 2nd section of that act,) are directed to be discontinued in England and Ireland. The ecclesiastical courts however, still pronounce sentences of excommunication, but since that statute, the ancient punishment of excommunication is taken away, the person excommunicated incurs no civil penalties, except such imprisonment as the court in the exercise of its discretion may think proper to direct, not exceeding six months.(z)

By statute 53 Geo. 3, c. 127, s. 1,(y) it is enacted, That in all causes which are cognizable in the ecclesiastical courts, when any person or persons having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court, shall neglect or refuse to appear, or to obey such lawful orders or decrees, or when any person or persons shall \*commit a contempt in the face of such [ \*495 ] court, no sentence of excommunication shall be given or pronounced, except in the particular cases specified in the act ;(u) but

(r) Rep. Eccl. Comm. p. 16.

(s) Addams, 11, 12. See *Bowler v. Har-*

*vey*, 4 Hag. Eccl. R. 241.

(t) *Butler v. Dolben*, 2 Leo's R. 319.

(v) *Greg v. Greg*, 2 Addams, 276.

(w) 3 Bl. Com. 101.

(x) *Hoile v. Scales*, 2 Hagg. Eccl. R. 596.

(y) The provisions of the stat. 53 Geo. 3, c. 127, ss. 1, 2, 3, are extended to Ireland by 54 Geo. 3, c. 68, ss. 1, 2, 3.

(u) The second section provides, "That nothing in this act contained shall prevent

instead thereof the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been committed, may pronounce such person or persons contumacious and in contempt, and within ten days may signify the same in a certain form(x) to the court of chancery, as had theretofore been done in signifying excommunications; thereupon a writ *de contumace capi-* [ \*496 ] *endo* in a certain form(y) shall issue \*from the court of chancery, directed to the same persons to whom the writs *de excommunicato capiendo* had heretofore been directed; and the same shall be returnable in like manner as the writ *de excommunicato capiendo* had been by law returnable heretofore, and shall have the same force and effect as the said writ; all rules and regulations not thereby altered, then by law applying to the said writ and the proceedings following thereupon, and particularly the several provisions contained in the statute 5 Eliz. c. 23, shall extend and be applied to the said writ *de contumace capiendo*, and the proceedings following thereupon, as if the same had been therein enacted. The proper officers of the said court of chancery are required to issue such

any ecclesiastical court from pronouncing or declaring persons to be excommunicated in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced, as spiritual censures for offences of ecclesiastical cognizance, in the same manner as such court might lawfully have pronounced or declared the same had this act not been passed."

The third section enacts, "That no person who shall be so pronounced or declared excommunicated shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court pronouncing or declaring such person excommunicate shall direct; and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his majesty in chancery, in the same manner as excommunications have been heretofore signified; and thereupon the writ *de excommunicato capiendo* shall issue, and the usual proceedings shall be had, and the party taken into custody shall remain therein for the term so directed, or until he shall be absolved by such ecclesiastical court."

(s) "To her most excellent majesty and our sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland queen, defender of the faith, by Divine Providence, &c. health in Him by whom kings and princes rule and govern: we hereby notify and signify unto your majesty that one of in the county of hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not [as the case

may be] appearing before [here set out the style of the ecclesiastical judge or representative], or in not obeying the lawful commands [here set out the commands] of [such judge or representative], or in having committed a contempt in the face of the court of [such judge or representative,] lawfully authorised by [here set out the nature and manner of such contempt] on a day and hour now long past, in a certain cause [here set out the nature of the cause, and the names of the parties to the same]. We therefore humbly implore and intreat your said most excellent majesty would vouchsafe to command the body of the said to be taken and imprisoned for such contumacy and contempt. Given under the seal of our court the day of

A. B. registrar  
[or "deputy registrar," as the case may be]."

(y) "Victoria, &c.: To the sheriff of greeting: The hath signified to us that of in your county of is manifestly contumacious, and contemns the jurisdiction and authority of [here fully state the nonappearance, disobedience, together with the commands disobeyed, or the contempt in the face of the court, as the case may be], nor will he submit to the ecclesiastical jurisdiction; but forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you that you attach the said by his body, until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto and in nowise omit this, and have you there this writ. Witness ourself at Westminster, the day of in the year of our reign."

writ *de contumace capiendo* accordingly; and all sheriffs, gaolers, and other officers are thereby required to execute the same, by taking and detaining the body of the person against whom the said writ shall be directed to be executed; and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the court, the judges or judge of such ecclesiastical court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, gaoler, or other officer in whose custody he shall be, in the form prescribed by the act(z) for discharging \*such party out of custody; and such sheriff, gaoler, or other officer shall, [ \*497 ] on the said order being shown to him, so soon as such party shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him."

*Process against Persons privileged, or out of the Jurisdiction.*—Great inconvenience formerly arose by reason of the process of the several ecclesiastical courts in England and Ireland being inoperative and unavailable out of the limits of the respective jurisdictions of such courts, and against persons having privilege of parliament, as peers, and members of the house of commons. The process of such courts, and the means of enforcing obedience to the same, are now of equal force, and have the like operation in England as in Ireland, and as well against such privileged persons as against all other subjects.

By stat. 2 & 3 Will. 4, c. 93, it is enacted, that where persons residing beyond the jurisdiction of any ecclesiastical courts, either in England or Ireland, are cited to appear, or are required to comply with any order or decree of such courts, and refuse obedience, the judge thereof may pronounce them contumacious, and certify the same to the lord chancellor within ten days; and if the person shall not be a peer, or member of the house of commons, a writ *de contumace capiendo* shall issue; and upon the appearance or submission of the party, the judge may order him to be absolved or discharged (s. 1). Where persons, whether peers, members of parliament, or not, shall refuse to comply with any order of any such courts, the judges may pronounce such persons contumacious, and certify the same to the lord chancellor, who shall cause process of sequestration to issue against the estate of the party, with the same power and effect as if it were an order of the court of chancery (ss. 2 & 3). By s. 4 it is provided, that this act shall not extend to orders made more than six years since, which of course extends it to all orders made within that time.

(z) "Whereas of in your county of whom lately at the denouncing of for contumacy, and by writ issued hereupon, you attached by his body until he should have made satisfaction for the contempt; now he having submitted himself, and satisfied the said contempt, we hereby empower and command you, that without delay you cause the said

to be delivered out of prison in which he is so detained, if upon that occasion and no other he shall be detained therein. Given under the seal of our of

A. B. registrar  
[or "deputy registrar," or as the case may be.]

Extracted by E. F., proctor."

The 28th section of 3 & 4 Will. 4, c. 41, enacts, that the judicial [ \*498 ] committee shall enjoy all the powers of punishing \*contempts, and of compelling appearances, and his majesty in council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, as are now exercised by the court of chancery or King's Bench, (and both *in personam* and *in rem*); or as are given to any court ecclesiastical, by an act passed in 2 & 3 Will. IV. c. 92,(b) intituled an act for enforcing the process upon contempts in the courts ecclesiastical in England and Ireland; and that all such powers as are given to courts ecclesiastical, if of punishing contempts, or of compelling appearances, shall be exercised by the said judicial committee; and if of enforcing decrees and orders, shall be exercised by his majesty in council in the same manner as the powers in and by such act given, and shall be of as much force and effect as if the same had been expressly given to the said committee or to his majesty in council.

*Sentence of Contempt.*—We have already seen that the ecclesiastical judge or judges are to pronounce the party in contempt, and to certify the same by writ of *significavit* to the court of chancery.(c) Contumacy is a wilful contempt and disobedience to any lawful summons or judicial order.(d) An insane person cannot be guilty of a contempt so as to be legally responsible.(e) An erroneous notion has prevailed that a contempt must be some disrespect shown to the court. Contempts are usually incurred by a party's neglect or refusal to do some act which is in justice due to the other party in the cause; and the imprisonment which follows is at the prayer of the other party, a prayer to which the court cannot refuse to accede without a breach of its duty, and a denial of justice.(f) Thus where a husband neglects to pay alimony *pendente lite*,(g) where a wife refuses to return to her husband, though directed to do so by a decree of the court,(h) for nonpayment of costs,(i) or in any other case where the personal intervention of the principal is requisite to the act to be done, the practice is to take a monition against the party, which must be [ \*499 ] personally served,(k) and it is upon disobedience to \*this monition that the party is pronounced contumacious.(l) A party cannot be pronounced in contempt at the same time that his answers are held insufficient.(m) A party not giving in his answers on the day of the return of the decree, personally served, will be pronounced contumacious, and so will a witness for not appearing to a compulsory.(n) Such a monition is only in effect in the nature of a rule to show cause, and its issue is by no means conclusive, for upon its return the party monished may appear, and pray it to be superseded.(o) The *significavit* was suspended where the inability of a husband to pay alimony and costs was shown,(p) and when there

(b) *Anta*, 497.

(c) *Anta*, p. 495.

(d) *Ayliffe*, 197.

(e) *Barlee v. Barlee*, 1 Add. 306.

(f) 1 Addams, 304.

(g) 1 Hagg. Eccl. R. 24.

1 Addams, 301.

Hagg. Eccl. R. 653; 1 Addams,

308.

(k) 1 Addams, 101.

(l) *Ib.* 308.

(m) *Morgan v. Hopkins*, 2 Phill. R. 582.

(n) *Wylie v. Mott*, 1 Hagg. Eccl. R. 33.

(o) *Austen v. Dugger*, 1 Addams, 311; 3 Phill. 124; 5 B. & Ald. 791.

(p) 2 Lee, 263.

was a mere informality, and the party had virtually obeyed, and was ready to obey the monition.(q)

If a party committed for nonpayment of costs under an erroneous process be thereupon released, the ecclesiastical court is bound, at the application of the party to whom they are *still due*, to issue a new monition for payment of such costs. As where the court of King's Bench held the *significavit* defective in not stating with sufficient certainty the nature of the cause in which the costs were incurred, so as to fix it within the jurisdiction of the ecclesiastical court.(r) Before the court will pronounce a party in contempt for the purpose of proceeding in a cause, the residence of the party must be fixed within the jurisdiction of the court at or before the issuing of the citation. If the residence be once fixed before the citation issues, the court will presume a continuance of it until the contrary be shown.(s)

*Personal Service.*—Whatever is to be done personally by the principal party in the cause requires in strictness a *personal* service of the notice or decree for doing it upon that party. Hence the service of a decree for answers upon the *proctor* will not justify the court in putting the principal in contempt if these answers are not brought in, and decreeing \*him to be signified pursuant to the statute [ \*500 ] 53 Geo. 3, c. 127.(t) Sir John Nicholl said, "Where steps are to be taken by the proctor merely, a mere assignation upon the proctor suffices, he being as to these '*dominus litis*.' But where the personal intervention of the principal is requisite to the act to be done, as it is, for instance, where costs are taxed against him, or where sums are decreed to be paid by him on account of alimony, the practice is to take out a monition against the party, not merely to serve a notice on the proctor, which monition must be personally served upon the party in all cases, that is, where it is requisite that the proceeding should be conducted with any semblance of regularity." And the learned judge, after conceding that the modern practice as to *personal answers* was to serve the decree on the proctor only, and not on the principal, added, "But it is a very different question whether such a service would justify the court in putting the party in contempt, and proceeding to signify him, in order to his imprisonment, under the statute; a measure which I conceive ecclesiastical courts to be only warranted in adopting where the prior proceedings have been conducted with the strictest regularity."(u)

A case has occurred since the passing of the 2 & 3 Will. 4, c. 93, s. 2,(x) where there had not been a personal service, but by ways and means to enforce the payment of alimony *pendente lite*, the party could not be personally served, the instrument was stuck up at the Royal Exchange and on the chapel where the party was in the habit of officiating; and the court, considering that the husband must have had cognizance of the proceeding, pronounced him contumacious, and a *significavit* issued.(y) Before the court will make an order under the stat. 2 & 3 Will. 4, c. 93, there must be an attempt to enforce an

(q) *Hamerton v. Hamerton*, 1 Hagg. Eccl.

23. (r) *Austen v. Dugger*, 1 Addams, 307.

(s) *Carden v. Carden*, 1 Curteis, 558.

(t) *Durant v. Durant*, 1 Addams, 114.

(u) *Ib.* 121.

(x) See ante, p. 497.

(y) *Hinzman v. Hinzman*, cited 1 Curteis, 468.

order of the ecclesiastical court; but if it clearly appears that the service has been evaded, the court will have no hesitation in pronouncing the party in contempt, and signifying it to the court of chancery; as where it appeared by the return that every attempt had been [ \*501 ] made to serve the \*monition.(z) The court will not decline to enforce a monition against a party in contempt of the court of Queen's Bench, and residing abroad to evade the process of that court.

The court will pronounce an Irish peer in contempt for non-payment of costs, and direct such contempt to be signified, leaving the lord chancellor to decide whether the writ *de contumace capiendo* should issue.(a) The order in the cursitor's office is, that in all cases where a *significavit* was prayed against a peer, the seal should not be affixed without notice to the lord chancellor.(b)

*Imprisonment for Contempt not in the Discretion of the Ecclesiastical Judge.*—Imprisonment for contempt is neither in the discretion nor terminable at the pleasure of the ecclesiastical judge by whom the party is pronounced in contempt. In a suit for restitution of conjugal rights, instituted by the husband, the wife pleaded cruelty, time was allowed her to produce her evidence, and that time having been repeatedly extended without the production of witnesses, the wife was decreed to return to her husband, and was imprisoned for contempt in not obeying the monition. On a petition presented by the wife, stating the great hardships which she had experienced and praying to be liberated, Sir John Nicholl said, carrying forbearance to the utmost point, the court could no longer, without an absolute denial of justice, refuse to signify the wife's contempt to the proper temporal jurisdiction on the demand of the husband. Here the authority of this court ceased—the imprisonment takes place under that of the temporal jurisdiction, nor has this court the power of releasing at pleasure, but only on the obedience of the party. This court can no more release in the way prayed than a judge at common law can, at pleasure, release a defendant who is imprisoned for non payment of damages recovered in an action. The imprisonment is here to enforce the legal rights of the husband; and unless the husband will consent to waive his rights, or unless she obey the monition, or unless it can be shown that she is not in a fit state of mind to obey, this court can take no step.(c)

[ \*502 ] \**Significavit*.—There seems to be some ambiguity in the use of the word *significavit*; when the word is used alone it means the bishop's certificate of the excommunication into the court of chancery, in order to obtain the writ of excommunication; but where the words "writ of *significavit*" are used, the meaning is the same as the writ *de excommunicato capiendo*.(d) It is not necessary that the defendant should be resident in the diocese at the time of the excommunication, it is sufficient if he were there at the time of the citation.(e)

*What judges must certify.*—All the judges whose orders have been

(s) *Greenhill v. Greenhill*, 1 Curteis, 268, 283.

(a) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. 653.

(b) *Ib.* 662.

(c) *Barlee v. Barlee*, 1 Add. 306.

(d) 2 Burn's Eccl. L. 248.

(e) *Rea v. Peyton*, 7 T. R. 153.

obeyed must certify under stat. 53 Geo. 3, c. 127, s. 1; two out of three judges delegate were held incompetent to do so.(f) The shop's surrogate cannot signify the contempt, in order to the issuing of the writ *de contumace capiendo*.(g) Where the court pronounced defendant excommunicate and sentenced him to seven days imprisonment, it was suggested that under the stat. 53 Geo. 3, c. 127, s. 3, it was necessary that the court should certify the sentence to the court of chancery; but the court held that it was not necessary to certify till called upon to proceed to the execution of the sentence; if called upon the court will be bound to proceed.(h)

*Writ issued by Chancery.*—It is competent to the court of chancery to issue several concurrent writs *de contumace capiendo*.(i) Where the first writ is quashed, another must issue from the court of chancery.(j) A second writ sued out of chancery, without any return made to the first, was held to be regular.(k) Before the writ issues to the sheriff, it goes into the court of Queen's Bench, to be entered of record, and that court may annul it for matter of nullity apparent on the face of it.(l)

*The Significavit must appear to be for Matter of Ecclesiastical Cognizance.*—At the common law, a certificate of the bishop, whereupon *significavit* was to be granted, ought to express the cause, use, and the suit against him specially in the certificate, [ \*503 ] to the end the temporal judges may see whether the spiritual court has cognizance of the original cause, and whether the excommunication be according to law; that if it be otherwise, they may write to him to absolve the party.(m) The bishop's certificate is not avoided by his death.(n) Two *significavits* were quashed because it was only stated to be in a cause which came by appeal concerning a matter purely spiritual; for the court held that they were not to lend their assistance but where it appeared clearly they had jurisdiction, and are not to trust the ecclesiastical courts to determine what is a matter merely spiritual.(o) The sentence must not be in general terms to do the usual penance, however well its limits may be understood in the ecclesiastical court, but it must specify what particular penance shall be done; and for that defect in the sentence the party was discharged.(p) On an application for a habeas corpus to bring up the defendant in order that he might be discharged out of custody on the ground of a defect in the warrant of commitment, it appeared on the face of the warrant that he was committed for a contumacy, in not paying a bill taxed costs to a proctor "in a certain cause of appeal and commitment of nullity lately depending in the Arches court of Canterbury, between J. A. appellant, and R. D. appellee." The warrant was held insufficient, in not stating with certainty the nature of the cause as to show that it was one apparently within the jurisdiction of the

f) *Rex v. Ricketta*, 6 Ad. & E. 537.

g) *Reg. v. Jones*, 21 June, 1839. 10 Ad. 576.

h) *Hoile v. Scales*, 2 Hagg. Eccl. R. 597.

i) *Rex v. Blake*, 2 Nev. & M. 312; 4 B. Ad. 355.

j) *Rex v. Eyre*, 2 Str. 1190.

August, 1841.—Z.

(k) *Rex v. Blake*, 4 B. & Ad. 355.

(l) 2 Hagg. Eccl. R. 661, 662.

(m) 2 Inst. 623.

(n) 1 Inst. 134; 2 Barn's Eccl. L. 249.

See 10 Geo. 4, c. 53, ss. 12, 13.

(o) *Rex v. Eyre*, Str. 1067—1189.

(p) *Rex v. Maby*, 3 Dowl. & R. 570.



ecclesiastical court.(q) Where a writ *de contumace capiend*o set out the sentence of the spiritual court, which, amongst other matters, directed certain costs to be paid by the defendant, the court of Queen's Bench refused to quash the writ for an alleged invalidity in the sentence as to the other matters, that part of it being good which awarded costs against the defendant, who was therefore in contempt for the non-payment of them.(r)

[ \*504 ] *\*Return of Writ.*—All writs *de excommunicato capiend*o to be awarded out of chancery shall be made in term time, returnable in the ensuing term into the King's Bench, and shall be there openly delivered of record to the sheriff, who shall be amerced in case the writ be not duly returned.(s) The stat. 1 Will. 4, c. 3, s. 2, which enacts that all writs returnable in the King's Bench, Common Pleas, or Exchequer, on general return days, may be made returnable on the third day exclusive before the commencement of each term and the day of appearance, shall, as heretofore, be the third day after such return, exclusive of the day of the return, applies to all writs, not merely to those on mesne process, and consequently it extends to a writ *de contumace capiend*o.(t) On the return day of the writ, the sheriff is not compellable to bring in the body; but on return of *non est inventus*, a *capias* shall issue, returnable in term time two months after the teste, with proclamations against the party to surrender, penalty 10*l.*; and on his default such penalty shall be estreated, and a fresh *capias* with like proclamation to surrender on forfeiture of 20*l.* to the crown, and so continually until the party shall surrender.(u) A writ of *capias cum proclamatione*, under statutes 5 Eliz. c. 28, and 53 Geo. 3, c. 127, must issue the same term in which the return to the writ of *capias de contumace capiend*o is made; and if a term intervene, a discontinuance is worked, and the process is irregular.(x)

*Residence of Party.*—By stat. 53 Geo. 3, c. 127, the writ must be directed to the sheriff of that county of which the party is described to be in the *significavit*. A writ *de contumace capiend*o is bad, and will be set aside, if it be directed to the sheriff of one county, and it appear by the writ that the defendant is resident in another. And that sufficiently appears if the party be described as of the latter county.(y)

*Nature of Commitment.*—The writ *de contumace capiend*o is not properly speaking a commitment in execution, but for contempt; a [ \*505 ] party therefore in custody for contempt, in *\*disobeying* the sentence of the ecclesiastical court to pay a sum less than 20*l.* and costs, is not within the act 48 Geo. 3, c. 128, for the discharge of debtors in execution for small debts under imprisonment in certain cases, and cannot be discharged from it.(z) A party already in the custody of the marshal may be charged in such custody with the writ *de contumace capiend*o,(a) and as it seems is

(q) *Res v. Dugger*, 5 B. & Ald. 791; *In re Gale*, 1 Harr. & Woll. 59.

(r) *Kington v. Hack*, 3 Nev. & P. 3.

(s) Stat. 5 Eliz. c. 23, s. 1; *Impey's Off. Sec of Sheriff*, 367, 6th ed.

(t) *Res v. Blake*, 4 B. & Ad. 355.

(u) 5 Eliz. c. 23, s. 2.

(x) *Reg. v. Ricketts*, 1 Perry & D. 150; 2 Jurist, 1039.

(y) *Res v. Ricketts*, 6 Ad. & Ell. 537.

(z) *Ex parte Kaye*, 1 B. & Ad. 652.

(a) *Res v. Bailey*, 9 B. & C. 67.

entitled to the benefit of the rules of the Queen's Bench prison.(b) Consequently if a party be imprisoned in such a case in a county prison, he may be removed into the Queen's Bench prison, and then obtain the benefit of the rules.

The discharge of any prisoner by the insolvent debtors' court may extend to all process issuing from any court, for any contempt of any court, ecclesiastical or civil, for nonpayment of money, or of costs or expenses in any court ecclesiastical or civil, and in such case such discharge shall be deemed to extend also to all costs which such prisoner would be liable to pay in consequence or by reason of such contempt or on purging the same.(c)

*Form of the Pleadings.*—Causes in their quality are technically classed and described as *plenary* and *summary*, though in modern practice there is substantially but little difference in the mode of proceeding. All causes in the prerogative court are summary; so are proceedings on appeals before the privy council, whatever be the character of the original causes; but other causes, whether of a criminal or civil nature, are *plenary*.(d) *Plenary* causes, or ordinary causes, are those which require a solemn order in the proceedings; as the contestation of suit, a term assigned to propound and invoke all acts, &c., a term to conclude and a due form of concluding in that term, &c., and thence it is that they are called *plenary*.(e) The first plea bears different names in the different descriptions of causes. In criminal proceedings, the first plea is termed the articles; in form, it \*runs in the name of the judge, who articles and objects [ \*506 ] the facts charged against the defendant; in *plenary* causes, not criminal, the first plea is termed the *libel*, and runs in the name of the party or his proctor, who alleges and propounds the facts founding the demand; in testamentary causes, the first plea is termed an allegation. Every subsequent plea, in all causes, whether responsive or rejoining, and by whatever party given, is termed an allegation. Each of these pleas contains a statement of the facts upon which the party founds his demand for relief, or his defence; resembling the bill and answer in equity, except that the allegation is broken into separate positions or articles: the facts are alleged under separate heads, according to the subject-matter, or the order of time in which they have occurred. Under this form of pleading, the witnesses are produced and examined only to particular articles of the allegation, containing the facts within their knowledge; a notice or designation of the witnesses being delivered to the adverse party, who is thereby distinctly apprised of the points to which he should address his cross-examination of each witness, as well as the matters which it may be necessary for him to contradict or explain by counter-pleading.(f)

*Of the Libel.*—Instead of the declaration at common law, or bill in equity, the statement of the complaint is termed a *libel*, *libellus*, a little book containing articles drawn out in a formal allegation, setting forth the complainant's ground of complaint.(g) A libel has been

(b) *Ib.*; see *Re v. Buckland*, 1 Str. 413.

(c) 1 & 2 Vict. c. 110, s. 79; 7 Geo. 4, c. 57, s. 50.

(d) *Rep. Ecol. Comm.* p. 16.

(e) *Conset.* 22; *Cockburn*, 6, 7.

(f) *Rep. Ecol. Comm.* p. 16, 17.

(g) 3 *Bl. Comm.* 100.

defined to be "the plaintiff's petition or allegation, made and exhibited in a judicial process, with some solemnity of law;" it has also been called "a short and well ordered writing, setting forth in a clear manner, as well to the judge as to the defendant, the plaintiff or accuser's intention in judgment; so that a libel ought to be short and not verbose, for the law abhors a prolixity of words." "Every solemn libel," ought to contain five things; first, the name of the plaintiff, who makes a demand by bringing his action; secondly, the thing itself in demand or controversy; thirdly, the name of the defendant [ \*507 ] from whom the demand is made; fourthly, the action whereby the demand is made and the defendant sued; and, fifthly, it ought to mention the judge or person by whom judgment is given, with a description of his power and commission; all which things are thus summed up in Latin, quis, quid, a quo, qualiter, et coram quo petatur.(m) Copies of the libels in suits in the spiritual courts are to be duly delivered to the party requiring the same.(n) If the spiritual court refuses to give a copy of the libel, a prohibition will be granted *quousque*; but there must be an affidavit that such copy was demanded and refused.(o) The libel or complaint of the plaintiff is generally limited by the citation, beyond which it cannot be extended.(p) The libel must contain a distinct averment of the ground of complaint, as we have already seen in considering suits for divorce by reason of adultery.(q) A libel or plea may be rejected if it discloses a case so palpably false that it cannot be proved, or if it is apparent, from the facts pleaded, that the complaining party is barred.(r) Where a legal ground for the suit appears on the face of the libel, it seems sufficient to state the facts upon which the suit is founded. In a libel for restitution of conjugal rights, it is not necessary to plead specifically that the parties were of twenty-one years of age at the time of the marriage, if it is averred that the marriage was lawfully solemnized in consequence of a license duly obtained.(s) In suits of nullity of marriage the nature and character of the alleged marriage sought to be set aside should be distinctly pleaded.(t) It is usual to plead consummation, cohabitation, and mutual acknowledgment, although a marriage duly solemnized may be valid without them.(u) Where reliance is placed on the \*general law, [ \*508 ] it is not necessary to plead it.(x) But a law peculiar to any class or sect, which is brought forward in support or justification of an act, should be distinctly pleaded.(y) Thus in a suit between two Jews, it was suggested that the Jewish religious regulations

(m) Ayliffe, Parer. 346; Conset. p. 402, thus describes these five qualities in verse. Quis, quid, coram quo, quo jure petatur, et a quo

Rectè compositus quique libellus habet.

Of which this English translation is given.

Each plaintiff and defendant's name,

And eke the judge who tries the same;

The thing demanded and the right whereby

You urge to have it granted instantly:

He doth a libel write and well compose,

Who forms the same omitting none of those.

(n) 2 Hen. 5, st. 1, c. 3.

(o) Vent. 252; 6 Mod. 308; Bac. Abr. Eccl. Courts (E.)

(p) 4 Hagg. Eccl. R. 89.

(q) Ante, pp. 398—400.

(r) 1 Hagg. Eccl. R. 766; ante, p. 400.

(s) 2 Phill. 119; 1 Hagg. Eccl. R. 776.

(t) 2 Addams, 326; ante, p. 113, n. (b)

(u) 2 Addams, 398. That non-residence ought not be pleaded, see ante, pp. 239, 240.

(x) 1 Hagg. Cons. R. 172.

(y) Ib. 219.

allowed concubines. But if by the Mosaic law, as at present received, there be any such privilege among the Jews themselves, Lord Stowell said it would be a great question how it could be attended to in a Christian court, to which they had resorted, and if it could be noticed, it ought to have been specially pleaded, but he thought it could not. (z) In a case depending upon the law of Scotland, or a foreign law, such law should be pleaded. (a)

*Exhibits in Supply of Proof.*—In libels in the ecclesiastical court it is usual to plead, in supply of proof of the statements, and to annex and pray to be taken as part of the libel, copies of registers, or other documents. Deeds should not be annexed to an allegation, but be deposited in the registry, and the material parts only recited in the plea. (b) When any exhibits are pleaded in supply of proof, the proctor of the adverse party shall, on the day on which the plea is admitted, declare whether he confesses or denies the handwriting as pleaded of such exhibits, and if the handwriting be denied and afterwards proved, the costs occasioned by the proof shall be paid by the party who denied the handwriting, unless the court shall think fit to direct otherwise. (c)

*Pleading Contents of an Instrument.*—It is a settled rule that a party cannot plead the contents of an instrument, unless it is destroyed, or in the possession of the adverse party. Therefore the court reformed an article in a libel pleading a correspondence between the defendant and the party with whom he was charged to have committed adultery, where the letters were not annexed to the libel, nor was it pleaded that they were in the possession of or under the control of his wife. (d) The contents of or extracts from written documents must not be pleaded without annexing the same; and even [ \*509 ] if the adverse counsel do not object to the non-annexation, the court must take the objection, for it cannot adjudicate a case on that which is not legal evidence. (d) But where a letter is pleaded to be in the possession of the adverse party, either passages from or the contents of the letter may be pleaded and substantiated in the best way possible, and it will be left to the other party to produce the letter or not, as may be deemed advisable. (e) The ecclesiastical court cannot inquire criminally into cases where it would otherwise inquire if not cognizable at common law, but we have seen that a conviction and felonious act may be pleaded as a necessary fact of the evidence in a civil suit. (f) The finding of a true bill, or the conviction of a witness for perjury, is no ground at common law for a new trial, nor in equity for a supplemental bill, so they cannot avail to the postponement of the hearing of a cause depending in the ecclesiastical courts. (g)

(z) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 785.

(a) *Ante*, p. 113; 2 Hagg. Cons. R. 371.

(b) *Myan v. Robinson*, 1 Hagg. Eccl. R. 431.

(c) *Order of Court*, 3rd Sess. Hilary Term, 1830; 2 Hagg. Eccl. R. xvi.

(d) *Morse v. Morse*, 2 Hagg. Eccl. R. 608.

(d) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 272.

(e) *Croft v. Croft*, 3 Hagg. Eccl. R. 317.

*See ante*, 402.

(f) *Bromley v. Bromley*, 1 Hagg. Cons. R. 141, n.; *ante*, p. 223—231. 401.

(g) *Maclean v. Maclean*, 2 Hagg. Eccl. R. 601; 1 Bing. 339; *Warwick v. Bruce*, 4 Maule & S. 150; *Bartlett v. Pickersgill*, 4

*East*, 577, n.

*Objections to the Admissibility of Pleadings.*—Before a plea of any kind, whether articles, libel or allegation, is admitted, it is open to the adverse party to object to its admission, either in the whole or in part; in the whole, when the facts altogether, if taken to be true, will not entitle the party giving the plea to the demand which he makes, or to support the defence which he sets up; in part, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved by admissible evidence, or are incapable of proof.

These objections are made and argued before the judge, and decided upon by him, and his decision may be appealed from. For the purpose of the argument, all the facts capable of proof are assumed to be true: they are however so assumed merely for the argument, but are not so admitted in the cause; for the party who offers the plea is no less bound afterwards to prove the facts; and the party who objects to the plea is no less at liberty afterwards to contradict [ \*510 ] the facts.<sup>(h)</sup> The principle, that the contents of the libel are to be taken for the purpose of argument as true, does not go the length of supposing every syllable stated to be true. Averments distinctly pleaded as facts must be assumed to be proved; while averments of an inferential and argumentative character, and which should not be too lavishly introduced, are to be taken only as true to the extent that the inferences themselves can fairly be drawn from the circumstances pleaded as facts.<sup>(i)</sup> This proceeding is attended with great convenience, in abridging the introduction of unnecessary and improper matter, to which parties themselves are generally too much disposed. They are apt to consider trivial circumstances to be important, and desire them to be inserted in the plea; a desire which neither the honest reluctance of the practitioners, nor the judicious advice of counsel, is always able to counteract: even the authority and vigilance of the court itself cannot altogether prevent redundant pleading, and can only check it by taking it into consideration on the question of costs. The proceedings just referred to have also the convenience of enabling parties, in many instances, to take the opinion of the court in a very summary way, particularly in amicable suits: if the facts are candidly stated, and the court, upon the plea being objected to, should be of opinion, that, if proved, the facts either will or will not support the prayer of the plea; in the one case, if the plea is admitted, the further opposition may be withdrawn; in the other case, if the plea is rejected, the party offering it either abandons the suit, or appeals, in order to take the judgment of a superior tribunal. This course saves the expense and delay consequent upon proving the facts by witnesses, in cases where there exists no doubt of the facts being correctly alleged in pleas, and where the question between the parties is principally or perhaps altogether a question of law, arising out of the facts so stated in the plea.<sup>(k)</sup>

*Contestatio Litis.*—If the libel or articles are admitted, the defendant may contest the libel affirmatively or negatively. If he is not

(A) Rep. Eccl. Comm. p. 17.

(i) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 266; *Croft v. Croft*, 3 Hagg. Eccl. R. 311; *Lock v. Denner*, 1 Addams, 353.

*Montgomerie v. Montgomerie*, 3 Addams, 354.

(k) Rep. Eccl. Comm. pp. 17, 18. See

desirous of contesting the suit negatively he may \*confess [ \*511 ] the libel and contest the suit affirmatively, and submit himself to the judge and offer what damages are to be taxed, or he may contest the suit negatively by denying it,<sup>(l)</sup> and this is what is called *contestatio litis*, or contesting suit, upon which the defendant is assigned to answer thereto. If the plaintiff consider that he may be better relieved by the answers of the party principal, he may upon prayer to the court obtain a decree for an answer.<sup>(m)</sup>

*Of Answers.*—When the plea has been admitted, a time, or term probatory, is assigned to the party<sup>(n)</sup> who gives the plea to examine his witnesses, and the adverse party is \*assigned, except [ \*512 ] in criminal matters, to give in his *answers* upon oath to his knowledge or belief of the facts alleged.<sup>(o)</sup> A personal answer ought to be pertinent to the matter in hand—absolute and unconditional—and clear and certain.<sup>(p)</sup>

Personal answers are provided in law to assist the proof of the adverse party. If these answers are not clear, full, and certain, they are considered in law as not given at all, and upon motion the judge ought by an interlocution to enjoin new answers; it being the same thing to give no answer at all as to give a general and insufficient answer.<sup>(q)</sup> Answers are not confined to being mere echoes of the plea, accompanied with simple affirmances or denials, but the respondents are at liberty to go into all matters not more than sufficient in fair construction to place the transactions, as to what the

(l) Conset. 86.

(m) lb.

(n) If due diligence has been used, the term probatory may be extended for the examination of material witnesses; *Portsmouth v. Portsmouth*, 1 Hagg. Eccl. R. 1. See *Jenkins v. Barrett*, Id. 12. A term probatory is said to be that time or delay which was given to the plaintiff wherein he might prove what he pleads or sues for; nor has the plaintiff the sole and absolute benefit of it, for the defendant may likewise make use of this term, if the plaintiff renounces it; Conset. 107; see Oughton, tit. 75.

#### Orders of the Court.

1. That on the first session of every Hilary, Easter, and Michaelmas term, publication shall pass on all pleas given in and admitted on or before the by-day of the term preceding; unless upon such first session cause be shown, to the satisfaction of the court, for extending the term probatory. Provided that nothing herein contained shall preclude the court from assigning a shorter term probatory, or prevent the party giving the plea from sooner praying publication.

2. That a party intending to counterplead shall assert his allegation the court day on which the term probatory expires, and shall bring it in on the following court day; unless on that day cause be shown to the satisfaction of the court for allowing further time for bringing in such allegation.

3. That upon answers being prayed the

proctor praying the answers shall forthwith take out a decree, (see order dispensing with a decree, post, p. 513,) and shall cause the same to be duly served without delay on the adverse party in the cause, so as to put such party in contempt, in case the decree shall not be within a reasonable time. Provided that the examination of witnesses shall not be delayed, nor the publication be postponed, in order to wait for the answers; but publication shall pass as aforesaid, unless upon application being made to postpone the publication it shall appear to the satisfaction of the court that due diligence had been used in taking out and enforcing the decree for answers.

4. That when application is intended to be made for extending the time in any case, notice thereof in writing, and of the grounds on which the application is to be made, shall be given to the adverse proctor, and delivered into the registry three days before the making of such application.

5. That any neglect or delay in bringing in answers, or in other proceedings, shall be matter of consideration in respect of costs, either immediate or at the end of the cause.

Order 1st Sess. Easter T. 1827, as to Cons. extended to Arches, 2nd Sess. Easter T. 1828; 1 Hagg. Eccl. R.

(o) Rep. Eccl. Comm. 18.

(p) Ayliffe, Parer. 65.

(q) 1 Burn's Eccl. L. 54; Cockburn, 28, 32, s. 19.

answers are called for, in the true and proper light.(r) The answers are prepared by the practitioner, and either give a positive or qualified admission or denial to the averments contained in the plea, state ignorance of the circumstances pleaded, or enter into explanations respecting the same; they are afterwards submitted to the advocate engaged in the cause for him to settle, and after they have been carefully examined and approved of by the party, they are sworn to before the judge or his surrogate, and deposited in the registry with the other papers in the cause. The opponent party's proctor then obtains an office copy thereof, submits the same to his counsel, to advise upon their sufficiency, and should he be of opinion that they are insufficient, the objections taken are mentioned, and notice thereof sent to the judge, who, after hearing the arguments of counsel on both sides, decides upon their sufficiency or insufficiency, and if his decision be in the negative further amended answers are given in.(s)

If the party giving in any allegation shall require the answers of the adverse party, he shall, on the day on which his plea is admitted, apply to the court to assign a time for bringing in such answers, and unless the answers shall be brought in at or before the time assigned, [ \*513 ] the facts pleaded shall be \*taken *pro confesso*, as against the party so neglecting to give in his answers. That the expense of taking depositions to prove facts confessed in answers or admitted in acts of court, if taken after such confessions or admissions, shall be paid by the party producing the witnesses, unless the court shall think fit to direct otherwise.(t) That in all cases the court may extend the time upon reasonable cause shown.(u) In answer, a party, first, is bound only to answer to facts, not to his own motives nor to his belief of the motives of another person: second, where the plea avers ignorance of the real nature of a transaction by a party to such transaction and to the suit, the other party is, in his answers to such plea, allowed to state facts, inferring full knowledge thereof and acquiescence therein. A party is not bound to answer when his answer would criminate himself, nor, it should seem, when it would tend to degrade him.(v) If a party does not give in his answers on the day of the return of the decree personally served, he will be pronounced contumacious;(x) but a party cannot be pronounced in contempt at the same time that his answers are held to be insufficient.(y)

The use of answers is to supercede the necessity of taking evidence, causes are therefore sometimes heard upon the answer of the defendant only.(z) When answers have been taken to a libel, but no witnesses examined, the court must take the facts from the answers when read.(a) If the answers are incorrect or redundant, the other side should not bring the case before the court upon them but plead.(b) Answers only become evidence if read by the adverse party, which being at liberty either to do or omit, it rests with the

(r) 2 Addams, 40.

(s) 4 Chitty's Pr. 220.

(t) This order supercedes the necessity of taking out a decree for answers as directed by the third section of the order of court of Master term, 1827; ante, p. 511, n.

(u) Orders of Court made 3d session of Hilary term, 1830, 2 Hagg. Eccl. R. xv. xvi.

(v) *Swift v. Swift*, 4 Hagg. Eccl. R. 139.

(x) 1 Hagg. Eccl. R. 33; Cockburn, p. 28, n. 2.

(y) 2 Phill. R. 582.

(z) Ib. 385.

(a) Ib. 339.

(b) Ib. 340.

adverse party either to make or exclude them from being evidence in the cause by a very simple process.(c) The court has a right, not exercised by the advocates, of looking into the \*sworn [ \*514 ] answers of the parties, though not read as evidence; this has been done as to facts attending an alleged marriage.(d) The court refused to allow inspection by the registrar of depositions (taken abroad) prior to publication.(e) In a suit for a divorce for adultery by the husband, if a plea has been given in by the wife, and the husband has put in answers to it upon oath, the court will be at liberty to look into such answers.(f) In causes of adultery, proceeded against by libel for seeking a divorce, the defendant's answers may be, though they seldom are, taken to such parts of the libel as involve no direct or implied charge of adultery. But if adultery be prosecuted by articles *quoad pœnam legalem*, the defendant's answers may not be taken, not even to such parts of the articles as involve no charge of adultery either direct or implied. The same holds *mutatis mutandis* in proceedings for incest and other cases.(g)

*Oath ex Officio prohibited.*—The stat. 13 Car. 2, c. 12, s. 4, enacts, "That it shall not be lawful for any ecclesiastical judge, or any person exercising ecclesiastical jurisdiction, to tender or administer to any person whatever the oath usually called the oath *ex officio*; or any other oath whereby the person to whom such oath is tendered or administered may be charged or compelled to confess or accuse, or to purge him or herself of any criminal matter or thing whereby he or she may be liable to censure or punishment." In criminal suits an issue negative or affirmative is the only answer, and the calling for any other is an appealable grievance;(h) though not on oath, nor on points in themselves criminal.(i) By the common law of England no party is bound to furnish evidence against himself. In the ecclesiastical court and in the courts of equity, however, a party is bound to answer under some limitations; but there seems to be no precedent for compelling a party to answer as to secret intention and meaning; he is bound only to answer as to facts. It is the doctrine of the ecclesiastical courts that a party is not bound in criminal \*suits to answer so as to criminate himself however remotely—so as even to form a link in a chain of proof. [ \*515 ] And in a civil suit, as for instance in a suit for separation by reason of adultery, a party is not bound to answer those articles which involve an express or implied charge of criminality.(j) So in chancery the party is protected against answering any question not only that has a direct tendency to criminate him, but that forms one step towards it.(k) Sir John Nicholl said, "The decision in that case shows that a witness is not bound to criminate himself; *a fortiori* a party is not bound to answer where a witness is not; and my

(c) 2 Addams, 41.

(d) 2 Hagg. Cons. R. 127. 259; see 2 Addams, 41.

(e) *Swift v. Swift*, 4 Hagg. Eccl. R. 144, n.(f) *Best v. Best*, 2 Phill. R. 169.(g) *Schultes v. Hodgson*, 1 Addams, 111; Ante, p. 175.

(h) 1 Addams, 105; 1 Lee, 520; 1 Sid. 374.

(i) 1 Addams, 111.

(j) *Schultes v. Hodgson*, 1 Addams, 111; *Durant v. Durant*, ibid. 114; *Swift v. Swift*, 4 Hagg. Eccl. R. 154.(k) *Paxton v. Douglas*, 19 Ves. 225.



impression is, that a party is entitled to protection, not only if the answer may tend to criminate but even to degrade him.' (l)

*Allegation responsive.*—The defendant may, if he thinks proper, proceed at once to counterplead to the charge in the libel, or he may wait until the plaintiff has examined his witnesses before he gives on his part an allegation controverting his adversary's charge. This is called a *responsive allegation*, and is proceeded on in the same manner as the libel or articles. Objections to its admissibility may be taken, answers upon oath be required, and witnesses examined. (m)

*Allegation in Rejoinder.*—The plaintiff may again in his turn, in like manner, rejoin by a further allegation; and in that and every subsequent allegation the same course may be pursued. The general rule upon this subject is, that in a rejoinder to or upon a responsive allegation, the only facts strictly pleadable are those either contradictory to or explanatory of, facts pleaded in the allegation to or upon which it rejoins, and those *noviter perventa* to the proponent's knowledge; though the court may, under certain circumstances, in its discretion, permit facts to be pleaded which come under none of those descriptions. (n) In answer to a libel, the defendant may either deny the facts stated in the libel, or he may counterplead facts which, assuming the libel to be true, offer a legal defence to the charges [ \*516 ] contained in it. But it is \*not necessary that he should always distinctly deny or traverse the facts in the libel. He may state the facts in a different manner, so as to give them a different legal character and effect. Each party is entitled to state the circumstances his own way. (o) We have already seen, that *desertion* is not a ground of divorce, (p) and that the wife's ante-nuptial incontinence cannot be pleaded. (q) But if in answer to a libel for divorce, on the ground of adultery, where the parties were living apart at the time the adultery was charged to have been committed, the wife set up a case of desertion by the husband without any provocation on her part, it seems that the husband may fairly rejoin her ante-nuptial incontinence as a justification for separation, although the husband cannot make such a statement part of his original libel. (r)

*Supplemental Allegations.*—We have already seen that although the court will compel the parties to bring the whole of their substantive case before the court at once if possible, yet that in cases of adultery a party is not bound by the original charges in the libel, but that even acts of adultery not existing at the commencement of the suit may be brought forward in a supplemental allegation. (s) The conclusion of the cause may in some cases also be rescinded for the purpose of giving in fresh allegations. (t) The renouncing all further allegations, unless exceptive, is the virtual conclusion of the principal cause as far as the rights of the parties extend. They cannot retract without the leave of the court, which in its discretion may allow fur-

(l) *Swift v. Swift*, 4 Hagg. Eccl. R. 154.

(m) See Rep. Eccl. Comm. p. 18; ante, p. 503.

(n) *Dew v. Clark*, 2 Addams, 102.

(o) *Swift v. Swift*, 4 Hagg. Eccl. R. 144.

(p) Ante, p. 419. 435.

(q) Ante, p. 402.

(r) 1 Addams, 1.

(s) Ante, pp. 399, 400.

(t) Ante, pp. 402-404.

ther time for pleading.(u) For the cause is never concluded against the judge, who at the hearing may admit an allegation or exception if he shall think it necessary.(x) The ecclesiastical court is exceedingly cautious in admitting any plea after publication; there are \*strong objections which it is absolutely necessary for the party to get over; it would lead to subornation—witnesses might supply defects, might avoid contradictions, might make artificial evidence; these are evils which the court will strive in every possible way to prevent; and it therefore always requires strict and legal proof that these evils cannot happen. It must be shown that facts have come to the knowledge of the party since his former plea; this is always demanded, and is usually done by affidavit. The court has power on such affidavit, and always does for the purposes of justice, to exert its authority in admitting a plea of facts, which, for want of being known, could not be pleaded before. Where such facts and former want of information are shown, the court will never shut its ears, for otherwise it might give sentence when it knows that the party could possibly give a good reason against it. When this danger is removed, there is only one other reason against admitting such a plea, namely, delay or a want of proper diligence. Material facts newly come to the knowledge of the party may therefore be pleaded after publication.(y) According to the practice of the ecclesiastical courts, documents annexed to the interrogatories cannot be known to the other party to have been so annexed till publication of the evidence has passed, and when, without special leave, no further plea, unless exceptive, can be admitted.(z) No party, whether originally or a mere intervener in a cause, can of right plead in the principal cause after publication has once passed of evidence taken in that cause; but the court, if prayed, may still *ex gratia* permit a party to plead on cause shown.(a) The court, before granting a prayer to rescind the conclusion, in order to the admission of an allegation, requires an affidavit setting forth facts material as well as *noviter perventa*, and it generally also requires that the allegation pleading those facts shall be tendered at the time of making the prayer.(b) When the court is prayed to rescind the conclusion of a cause, in order to fresh matter being pleaded, it always requires to be satisfied both that the party praying it is not \*guilty of *laches*, and that the measure prayed is one essential to the ends of justice; it always further requires that some special ground be laid (as that of such fresh matter having *newly* come to the party's knowledge, or as the case may be) to found the prayer.(c) The ecclesiastical law, it is well known, demands for full proof the testimony of two witnesses; in a case where on the evidence of one

(u) *Middleton v. Middleton*, 2 Hagg. Eccl. R. Suppl. 135.

(x) *Halford v. Halford*, 3 Phill. R. 103; *Ingram v. Wyatt*, 1 Hagg. Eccl. R. 105. 'To conclude in the cause is nothing else but to renounce all further discussing and disputing the matter, and to submit the controversy to the knowledge of the judge. Therefore the conclusion of the cause is a judicial act, whereby the cause or some article of the

cause is accounted for concluded: so that there is no room left for the parties' further disputation.—Conset. 156.

(y) *Middleton v. Middleton*, 2 Hagg. Eccl. R. Suppl. 134.

(z) 3 Hagg. Eccl. R. 352, n.

(a) *Clement v. Rhodes*, 3 Addams's R. 37.

(b) *Smith v. Blake*, 1 Hagg. Eccl. R. 88.

(c) *Durant v. Durant*, 2 Addams's R. 257.

witness the court is morally, though it cannot be judicially, satisfied of the guilt of the party charged, the conclusion of the cause will be rescinded for further proof. In *Searle v. Price*,<sup>(d)</sup> in a suit of nullity on account of a former marriage, the conclusion of the cause was rescinded in order to prove the identity of the party, and in another case to explain the delay in instituting the suit.<sup>(e)</sup> Matter pleadable in the principal cause cannot be pleaded after publication in exception to evidence.<sup>(f)</sup>

*Pleading in forma Pauperis.*—Either the plaintiff or the defendant in a suit, whether at the commencement of the proceedings, or in any subsequent stage of them, may be admitted in the ecclesiastical courts to plead in the form of a pauper under certain regulations.<sup>(g)</sup> A person may be admitted *in forma pauperis* if he swears that he is not worth 5*l.*, his debts being paid; and if the adversary requires it, he must swear that when he comes to a more plentiful fortune (if the suit be for tithes or legacies, &c.) he will pay the principal matter with costs.<sup>(h)</sup>

To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege, ought therefore to be clearly made out. It is a complete but not an uncommon misapprehension of the law, to suppose that because a person is in insolvent circumstances, \*and because he can truly and conscientiously swear that he is not worth 5*l.* after all his just debts are paid, that therefore he is entitled to be admitted, or rather to proceed as a pauper; it is *prima facie* ground to admit him as such, but no more; if it were otherwise, many persons living in great splendour and luxury would be so entitled: for many persons in business, in the enjoyment of an immense income, and maintaining a proportionate expenditure, would not be worth 5*l.* after the payment of their just debts.<sup>(i)</sup> The decisions however have gone on very different grounds. In *Riley v. Rivett*,<sup>(j)</sup> Riley prayed to be admitted a pauper, and swore he was 1,600*l.* in debt, but admitted that his brother allowed him annually for keeping his books 100*l.* The court decided that he was not entitled to be admitted. In *Barham v. Barham*,<sup>(k)</sup> the court stated, "If a person has the means by honest exertion to acquire a competence, he has no claim to be admitted a pauper. Mr. Barham in two years has expended 750*l.*; he is not the kind of person entitled to the indulgence of having the labours of others gratuitously;" and overruled his petition to be admitted a pauper. In an anonymous case,<sup>(l)</sup> where a motion was made to dispauper a person who was plaintiff in an action, because he had a living of 40*l.* a year.

(d) 2 Hagg. Cons. R. 187.

(e) *Best v. Best*, 2 Phill. R. 168.

(f) *Kenrick v. Kenrick*, 4 Hagg. Eccl. R. 187.

(g) *See Law's Eccl. Forms*, 62—67.

(h) Cockburn, 14.

(i) *Lovelin v. Edwards*, 1 Phill. R. 183.

(j) Before the Condelegates, 1794.

(k) Consist. June 13, 1789.

(l) 2 Salk. 507.

though he had sworn he was in debt more than he was worth; Holt, C. J. was of opinion that his being indebted was no reason; it was enough that he had a considerable estate in possession. In *Smith v. Smith*,<sup>(m)</sup> the court said, "If a party has a current income, though no permanent property, he must be dispaupered; this person has about 20*l.* a year from houses, he gets about 40*l.* a year by his business as a carpenter: his whole income is about 62*l.*;" and the court dispaupered. In *Shaw v. Shaw*,<sup>(n)</sup> the court laid it down, "The question is, whether to admit a party a pauper? Suing *in forma pauperis* is a great privilege, and only belongs to real poverty; the common rule, both at common law and in this court, is, that after payment of debts he must not be worth 5*l.*; yet this is not to be understood [ \*520 ] if there be an income, though after the settlement of his affairs he may not be worth 5*l.* A man worth an income of 5000*l.* per annum may not after payment of his debts be worth 5*l.* The party admits that he had an income of 70*l.* per annum, though he is in debt above 200*l.* beyond his effects, so that he is not in a state of extreme poverty. I shall reject his application to be admitted a pauper."<sup>(o)</sup> A party who by his business or profession is capable of obtaining a livelihood, although in possession of no property; is not entitled to proceed *in forma pauperis*.<sup>(p)</sup> A respondent may be admitted as a pauper, but having a sentence in his favour, very materially distinguishes his case from that of a person who attempts to appeal *in forma pauperis*.<sup>(q)</sup> The court looks at the pauper's faculties at the time of the application, and not at what property he might have been possessed of at a former time.<sup>(r)</sup> A pauper, so admitted in the middle of a suit, may at least be condemned in costs up to the time of his being admitted pauper.<sup>(s)</sup>

*Mode of taking Evidence.*—We now proceed to state generally the mode of taking evidence in the ecclesiastical courts. The subject is too extensive to be fully examined in a work of this kind. The witnesses are either brought to London to be examined, or if they reside at a great distance or are otherwise unable to attend, they are examined by commission near the places of their residence. The directions of the commission should be strictly followed; thus a direction to swear the witnesses in the presence of a notary cannot be dispensed with.<sup>(t)</sup> The judge of the ecclesiastical court has power to enforce the attendance of witnesses. Upon the proctor of a party alleging that A. B. is a necessary witness, and that he has been tendered his expenses, but refuses to attend and give evidence, the judge or his surrogate will direct a *compulsory* (being in the nature of a *sub-pœna*) to issue under the seal of the court wherein the cause is pending. \*Should the person, on being served therewith, treat the same with contempt, by not obeying the order or mandate [ \*521 ]

(m) Consist. Hilary Term, 1794.

(n) Consist. Mich. Term, 1807.

(o) *Lovekin and others v. Edwards and others*, 1 Phill. R. 183—186.

(p) *Walker v. Walker*, 1 Carleis, 561.

(q) *Taylor v. Morse*, 3 Hagg. Eccl. R. 179. See *Bland v. Lamb*, 2 Jac. & W. 402,

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where a pauper was admitted to appeal:

*Taylor v. Houchier*, 2 Dick. 504; 4 Br. P. C. 708, 2nd ed.

(r) *Taylor v. Morse*, 3 Hagg. Eccl. R. 179.

(s) *Flewood v. Cousins*, 1 Addams, 286.

(t) 2 Phill. R. 241.

therein contained, the proctor of the party, at whose suit the compulsory issues, procures a written notice to be served upon him intimating his intention of applying to the court on a stated day to pronounce him (the witness not attending) in contempt; and should this notice be unheeded, the court will generally pronounce such person in contempt on the day of the return of the compulsory,<sup>(u)</sup> and direct the same to be signified,<sup>(x)</sup> whereupon a writ *de contumace capiendo*,<sup>(y)</sup> issues from the court of chancery to take the offending party into custody where he remains until he declares his readiness to obey the mandate of the court; and upon so doing, a writ of deliverance<sup>(z)</sup> passes under the seal of the ecclesiastical court to release him from custody.<sup>(a)</sup>

It often happens that when publication passes, some portion of the evidence is unnecessary, yet the examiner cannot venture to exclude any part that is admissible, nor can even the party or his counsel often decide before the whole proofs are seen what can safely be withheld.

If the examiner entertains any doubt as to receiving evidence, it is safer not to reject it. That can be done ultimately by the court, and there is no irreparable injury done by the admission of evidence, as there would be by a too hasty exclusion; but care should be taken, in admitting specific facts in general inquiries, especially in cases of character, that the facts stated be plain and simple, and not such as will run into intricacy of discussion or ambiguity.<sup>(b)</sup> If the construction of an article in a plea is doubtful, an examiner will act prudently in taking the evidence down, and leaving it to the court to reject it afterwards, if extra-articulate.<sup>(c)</sup> It is a very irregular and dangerous practice for the proctors on each side to set down a full statement of what each witness can say in order that the examiner may examine by it. If a case depends on special facts, such facts [ \*522 ] should be specially pleaded; \*the party may then object if they are irrelevant, and the witnesses may be cross-examined to them. This is the only mode of obtaining evidence on which the court can rely.<sup>(c)</sup> The examiner should strongly disincline to receive specific facts, where the article admitted by the court is in general form.<sup>(d)</sup> Where the articles in the plea are general, it should be adhered to, and the examinations taken upon it should be likewise merely general. There may be cases where a specification under such an article may be received, particularly in cases merely civil; but where it is introduced, such specification should be so exact as to time and place, and all other material circumstances, as to give the party full opportunity of defence.<sup>(e)</sup> The facts allowed to be stated must be plain and simple, and not such as would probably run into intricacy of discussion.<sup>(f)</sup>

It is the general rule both of the civil and the canon law to examine witnesses secretly. This mode is practised not only in the ecclesias-

(u) *Wyllie v. Mott*, 1 Hagg. Eccl. R. 33.

(x) See form, ante, p. 495, n. (x).

(y) See form, ante, p. 495, n. (y).

(z) See form, ante, p. 496, n. (z).

(a) 4 Chitty's Pr. 223.

(b) 1 Hagg. Cons. R. 97; 1 Hagg. Eccl. R.

103.

(c) *Ingram v. Wyatt*, 1 Hagg. Eccl. R.

103.

(c) 2 Phill. R. 394, 395.

(d) *Evans v. Evans*, 1 Hagg. C. 96, n.

(e) *Ibid.*

(f) *Ibid.* 97.

tical courts of this country, but in the tribunals of all those countries where the ancient civil and canon law has been received in practice. The secrecy prescribed by the general rule is modified in different countries, for there are degrees of secrecy; a tribunal is secret, where it is held with closed doors; another species of secrecy is where only the judges and parties are present; another, where the judges only are present. Originally the witness was examined by the judge himself, taking to his assistance a notary to reduce the deposition into writing, no one else being present. In the ecclesiastical courts of this country the examinations are taken by a practitioner; who represents the judge; a notary, who reduces the deposition into writing, and who remains quite alone with the witness.(g)

The rule of the ecclesiastical court is to proceed upon written and not upon *viva voce* testimony, although under peculiar circumstances it may receive the latter species of evidence.(h)

\*The depositions are taken in private by the examiners of the court, employed for that purpose by the registrars. [ \*523 ] The examination does not take place upon written interrogatories previously prepared and known; but the allegation is delivered to the examiner, who, after making himself master of all the facts pleaded, examines the witnesses, by questions which he frames at the time, so as to obtain, upon each article of the allegation separately, the truth and the whole truth, as far as he possibly can, respecting such of the circumstances alleged as are within the knowledge of each witness.(h)

After the witnesses have given all the answers required, the depositions are to be read over to each witness, who is interrogated whether any thing has been put down contrary to or more than he deposed, and any correction, emendation, or addition, should be made, which the witness requires. The depositions, when finally approved, are to be signed by the witnesses. According to modern practice, it is sufficient if the witness, after his deposition has been committed to writing, is interrogated by the judge, or his surrogate, or by the registrar or an examiner in his presence, which is called a repetition or

(g) 2 Hagg. Cons. R. 267.

(h) *Jones v. Yernold*, 2 Lee, 568; *Ingram v. Wyatt*, 1 Hagg. Eccl. R. 105; 1 Curt. 427. See *Griffiths v. Anthony*, 5 Ad. & Ell. 623, where one objection in prohibition seems to have been the taking *viva voce* evidence in the consistory court, but no opinion was given on that point.

Sir John Nicholl made the following observations in favour of the mode of taking evidence in the ecclesiastical courts. "It is said, and very truly, that in *viva voce* examinations, the court and jury have the benefit of seeing the witness, and of collecting from his manner and deportment whether the substance of his evidence be true or false. This advantage is denied to our mode of examining witnesses; but then it has others, with which examinations of witnesses in open Court *viva voce* are not attended. It affords us an opportunity of considering maturely the story which the witness has told

deliberately, of balancing the parts of that story one with another, so far as to form an adequate opinion of its probability or improbability; finally, of inspecting its general tone and character, which last, to those the habit of whose life it is to consider written testimony, may ordinarily furnish as accurate a test of the forwardness or shyness of a witness, of his proneness to add or suppress, and the like, as his manner and deportment could do if the witness himself were examined in open court, where, it may be added, very erroneous impressions of these are sometimes at least liable to be formed from the mere embarrassment of witnesses of a certain character under that course of examination. All this, independent of the benefit of deliberately weighing and comparing the stories told by different witnesses." 1 Ad. dams, 195.

(A) Rep. Eccl. Comm. 18.

[ \*524 ] recognition of the deposition, which is confirmed \*by the examiner's subscription as notary public. The court admitted the deposition of a witness who had been examined in chief, and had signed his deposition, but had died before he had been repeated or examined on the interrogatories of the adverse party; but it was said that the deposition must be read at the hearing of the cause, with some deductions, because it was possible that the cross-examination might have discredited the witness.(h) So a deposition, one step further from completion, not having been actually signed by the deceased witness, was admitted, subject to a similar abatement of credit.(i)

*Cross-examination of Witnesses.*—The cross-examination is conducted by interrogatories addressed to the adverse witnesses, and when the deposition is complete, the witness is examined upon the interrogatories delivered to the examiner by the adverse proctor, but not disclosed to the witness till after the examination in chief is concluded and signed, nor to the party producing him till publication passon; and each witness is enjoined not to disclose the interrogatories, nor any part of his evidence, till after publication: in order that the party addressing the interrogatories may be the better prepared, the proctor producing the witness delivers, as before stated, a designation or notice of the articles of the plea, of which it is intended to examine each witness produced.(k) The general rule of practice is that twenty-four hours' notice shall be given to the cross-examining party for the preparation of interrogatories; but it seems that on a proper case being laid before the court, the time may be extended or abridged.(l) But a list of witnesses will not be ordered long before the time, on the ground that the party applying lives voluntarily abroad.(m) But a witness has not necessarily a right to be dismissed, because the interrogatories were not ready, and twenty-four hours had [ \*525 ] elapsed after notice to the adverse party of the \*production of the witness.(n) The cross-examination cannot extend to matter not bearing on the issue to be contradicted by other evidence in order to discredit the witness;(o) nor if a witness answers such irrelevant question before it is disallowed or withdrawn, can evidence afterwards be admitted to contradict his testimony on the collateral matter.(p) A party cannot except to a witness by contradicting answers to interrogatories, which go to incidental collateral matters not relevant.(q) The usual course of practice seems to be not to repeat the witness until after his cross-examination, but that he ought to sign his deposition as soon as his cross-examination in chief is finished, and not again to be allowed to see it, any material alterations made at the request of the witness should appear from the paper.(r) The interrogatories, by way of cross-examining the witness, are deposited in the registry of the court in which the suit is

(A) *Hill v. Bulkeley*, 1 Phill. 280; see *Copeland v. Stanton*, 1 P. Wms. 414; *Arundel v. Arundel*, 1 Ch. R. 90; Vin. Abr. vol. xii. p. 108.

(i) *Brace v. Knight*, 1 Addams. 340.

(k) *Rep. Dist. Comm.* 18.

(l) *Chapman*, tit. 33, n. 3; 1 Hagg. Eccl. R. 37; 3 Ib. 610.

(m) 2 Hagg. Eccl. R. 609.

(n) *Ingram v. Wyatt*, 1 Hagg. Eccl. R. 94.

(o) *Spencer v. De Willett*, 7 East, 108.

(p) *Harris v. Tippet*, 2 Camp. 632; *Re v. Watson*, 2 Stark. Cas. 151.

(q) 3 Hagg. Eccl. R. 630; 1 Curteis, 442, 448, 491.

(r) *Ingram v. Wyatt*, 1 Hagg. Eccl. R. 97, n.

pending by the examiner, to whom in the first instance they are delivered, and an office copy of them also can be obtained at the conclusion of the cause; but in general a private copy of such interrogatories is furnished by the proctor after publication of the evidence taken in the cause has been decreed.(s)

*Answer of Witness.*—If the answer of a witness be objected to for insufficiency, the court will decree a monition against him, to answer the interrogatories explicitly; and will compel him to do so.(t) A witness will be compelled to answer *explicitly* as to whether he is or is not responsible in some way for the party's expenses, on whose behalf he is examined.(u) So a witness upon cross-examination is compellable, if required, to produce all written communications made to the witness by the solicitor or agent of the producent, relative to his examination as a witness in the cause.(v)

\**Examination de Bene Esse.*—The ordinary practice [ \*526 ] of the ecclesiastical court does not allow the examination of witnesses *de bene esse*.(x) In a suit for restitution of conjugal rights, and to establish a foreign marriage, the court allowed, on the ground of an attempt to delay the proceedings, the witnesses as to such marriage to be examined *de bene esse* during the long vacation, though the libel was not admitted; and the husband had appeared under protest.(y) Such evidence being admitted only provisionally, left it open to every legal objection, either by the party showing irregularities in the examination, or the inadmissibility of the libel; and also open to the court to suppress the depositions, and to direct a re-examination of the witnesses if an opportunity occurred.(z)

*Re-Examination.*—The re-examination of witnesses is not absolutely excluded, but allowed with great jealousy. The court refused to accede to such an application, made on the ground that the witness was so unwell at the examination that his memory failed him, and consequently that his conscience compelled him to wish to be re-examined, where it appeared that such witness had been very fully examined, and concluded his deposition in the strongest terms.(q) A witness, who had been repeated and dismissed two years before, was not permitted to be examined at the end of that time upon an article of the plea which she had not been designed to at the time of her production as a witness, and which consequently she had not been examined upon in the first instance.(b) After publication the court will not allow witnesses to be re-examined in the ordinary mode, on a suggestion that the examiner, from a misconstruction of the plea, has improperly rejected evidence, but if essential to justice it may direct a *viva voce* examination in open court.(c) The court refused to allow further interrogatories to two witnesses who had been

(s) 4 Chitty's Pr. 166.

(t) 1 Addams, 352; 2 Addams, 468.

(u) *Hudson v. Beauchamp*, 1 Addams, 352.

A person employed by one of the parties as solicitor, who retained the proctor in the suit, and thereby became legally liable to him for costs, was held to be incompetent as a witness for the parties employing him. *Handley v. Edwards*, 1 Curteis, 722.

(v) 2 Addams, 468.

(x) 1 Lee, 558; 2 Lee, 149, 422.

(y) *Herbert v. Herbert*, 2 Hagg. Cons. R. 264. See 3 Phill. 587.

(z) *Herbert v. Herbert*, 2 Phill. R. 447.

(a) *Reeves v. Reeves*, 2 Phill. R. 117; see 1 Curteis, 427.

(b) *Wilkinson v. Dalton*, 1 Addams, 339.

(c) *Ingram v. Wyatt*, 1 Hagg. Eccl. R. 100.



[ \*527 ] examined in the cause, and said, that if the \*fact sought to be proved was material, it should have been pleaded in an allegation; if it affected the character of a witness it should have been stated in an exceptive plea, if it could be alleged to be matter *noviter ad notitiam perventa*, the court could have judged how far the facts were or were not material.(d)

*Excepting to the Credit of Witnesses.*—Witnesses, to whose general character there is no exception, are not to be rejected on conjectures and suspicions; but where a witness is grossly perjured, no credit in law can be given to his testimony.(e) The examination and cross-examination of witnesses is kept secret until *publication* passes, after which either party is allowed to except to the credit of any witness upon matter contained in his deposition. The exception must be confined to such matter, and not made to general character, for that must be pleaded before publication, nor can the exception refer to matter before pleaded, for that should be contradicted also before publication. The exception must also tend to show that the witness has deposed falsely and corruptly. These exceptive allegations are proceeded upon, when admitted, in the same manner as other pleas. They are not frequently offered, and are always received with great caution and strictness, as they tend more commonly to protract the suit, and to increase expense, than to afford substantial information in the cause. It is always however in the power of the court to allow further pleading in a cause; and if new circumstances of importance are unexpectedly brought out by the interrogatories, the court will, in the exercise of its discretion, allow a further plea after publication. This may also be permitted in cases where facts have either occurred or come to the knowledge of the party subsequently to publication having passed.(f) There may also be exceptions to the testimony of a witness not examined on the principal issue in the cause, but examined only in support of an exception to the testimony of a witness.(g) It is a principle of all courts whose \*proceedings are regulated by the civil law, that all facts shall be pleaded and proved before the depositions of the witnesses are seen, from the danger which might arise from the fabrication of evidence to meet defects of the case. An exceptive allegation must not merely show slight variations in the testimony of witnesses, but it must show that the witnesses have wilfully sworn falsely; it must overturn their credit. But the court relies more on the evidence to be collected from the substance of the depositions than from any thing usually brought forward in an exceptive allegation.(h) Exceptive allegations, offered after publication, are *stricti juris*, because the proofs having been seen, there would be great danger of perjury, as well as of endless delays, if further evidence could at that period be loosely or lightly received. Facts which might have been pleaded in contradiction to the pleas before publication cannot be pleaded in contradiction to a witness. The true object of an exceptive allegation is the credit of the witness, and an exceptive plea must contain a clear and distinct contradiction to the deposition, and be capable of being proved by

(d) *Evans v. Knight*, 3 Phill. R. 422—424.

(e) *Robins v. Wolseley*, 2 Lee, 421.

(f) *Rep. Eccl. Comm.* p. 18, 19.

(g) *Ball v. Ball*, 3 Addams, 10.

(h) *Verelst v. Verelst*, 2 Phill. R. 145, 147, 151.

witnesses so as to show that the witness had deposed falsely and corruptly. The exceptions must arise out of the depositions, not out of the general character and conduct of the witness.(i) The general rule is, that the character of a witness may be gone into before but not after publication. The facts as to the general character ought to be pleaded to when the responsive allegation is given in.(k) Lord Stowell adopted the rule that an exceptive allegation offered after publication can be admitted only as introductory, and being so the examiner is not to examine upon it.(l) An exceptive allegation before publication stands on the same footing with any other facts in the case. The admission of an allegation exceptive to the general character of a witness, after publication, was suspended till the final hearing of the cause, in order that if the evidence in the cause should be then so \*nicely balanced, that the court should be in [ \*529 ] doubt, it might be allowed to go to proof.(m)

A witness may be contradicted after publication as to facts to which he has deposed, these facts being *pertinent* to the issue to be tried, unless the facts so deposed to shall not have been pleaded in such a manner as to have enabled the party to contradict them before publication. It is a general rule in the ecclesiastical court that facts contradicted in an exceptive allegation must have some, though not perhaps a very strong, bearing upon the principal question.(n) So specific facts cannot be pleaded in order to support the character of a witness's testimony who has been impeached on the ground of general bad conduct.(o) For although such an investigation might by possibility in a few particular instances lead to the elucidation of truth, courts of justice cannot adapt their system to a few extraordinary cases; the great object to be sought for, is that mode of administering the law which may produce justice in the great majority of cases without overwhelming it by extravagant expense or destructive delay. The court will not delay the hearing of a cause on an affidavit that a true bill has been found against a material witness for perjury in her evidence in such cause; and it is doubtful whether even a conviction would be received in evidence.(p) The court will not admit an exceptive plea that an indictment of witnesses for perjury in their depositions in the cause pending has been preferred, and a true bill found, nor delay the hearing till the indictment is tried.(q) A plea, alleging the conviction of a witness for perjury, may sometimes be admissible, but the court would require that the conviction should not have proceeded on the evidence of the party in the suit, or of the alleged *particeps criminis*.(r)

*Examination of Witnesses in India on Parliamentary Divorces.*—

\*The speaker of either house of parliament may issue his [ \*530 ] warrant to the judges of the supreme courts of judicature

(i) 2 Hagg. Eccl. R. 481, 482; 1 Hagg. Cons. R. 95, n.

(k) 3 Phill. 372.

(l) 1 Hagg. Cons. R. 98, 99, n.

(m) *Chapman v. Parson*, 3 Phill. R. 370; see *Samson v. Cromwell*, ib. 220; *Evans v. Knight*, 1 Addams, 138.

(n) *Trevanion v. Trevanion*, 1 Curteis, 469.

(o) *Lambert v. Lambert*, 1 Curteis, 7.

(p) *Kenrick v. Kenrick*, 4 Hagg. Eccl. R. 133; *Thurtell v. Beaumont*, 1 Bing. 339; *Attorney-General v. Woodhead*, 2 Price, 3; *Bartlett v. Pickersgill*, 1 Cox, 15.

(q) *Maclean v. Maclean*, 2 Hagg. Eccl. R. 601.

(r) *Ibid*.

in the East Indies for the examination of witnesses in India, in cases of bills of divorce. Such judges, on receipt of the warrant, are to examine witnesses. Two copies of such examinations, duly certified, are to be transmitted to the speaker of either house of parliament. The judges may ask such questions and require such further witnesses to be produced as shall be necessary. The proceedings upon any bill of divorce pending such examinations under the speaker's warrant, are not discontinued by the prorogation or dissolution of parliament.<sup>(s)</sup>

*Hearing of the Cause.*—The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge, who having them in his possession for some days before the cause is opened, has a full opportunity of perusing and carefully considering the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel.

All causes are heard publicly in open court; and on the day appointed for the hearing, the cause is opened by counsel on both sides, who state the points of law and facts which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

*Judgment.*—The judgment of the court is then pronounced upon the law and facts of the case, and in discharging this very responsible duty, the judge publicly in open court, assigns the reasons for his decisions, stating the principles and authorities on which he decides matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of facts; and thus the matter in controversy between the parties becomes adjudged.

*Execution.*—The execution of the sentence, in case there be no appeal interposed, is completed by the court itself, by signing a sentence of separation, or decreeing a marriage to be void, [ \*531 ] according to the nature of the case, or remains to be completed by the act of the party, in which cases execution is enforced by the compulsory process of *contumacy*, *significavit*, and *attachment*.<sup>(t)</sup>

*Taxation of Costs.*—The question of costs in these courts is, for the most part, a matter in the discretion of the judge, according to the nature and justice of the case; and the reasons for granting or refusing costs are publicly expressed at the time of giving the judgment. It is true, as a general principle, that the court may exercise a discretion with respect to the costs, but this must not be understood to mean that it is in the power of the court to give or withhold costs as it pleases, but it means that costs are in the legal discretion of the court, adhering to general rules and former precedents.<sup>(u)</sup> If either party be condemned in costs, the proctor of the other party brings in his bill. The bill is referred to the registrar, who is attended by the proctors on both sides, and after examining the bill item by item, he

(s) 1 Geo. 4, c. 101, ss. 1—4.  
(t) *Reg. Eccl. Comm.* p. 19. See ante.

(u) *Goodall v. Whitmore*, 2 Hagg. Eccl. R. 374. See 2 Phill. R. 494.

allows or disallows, or modifies the several charges, according to the established practice, where such practice exists, and in other cases according to the reasonableness of each charge; having taken off all overcharges, he reports to the judge, in open court, the amount of the bill as allowed, and the proctor makes oath that the sum reported has been necessarily expended by or on behalf of his party. If no objection has been offered to the report, the judge then taxes the bill at that sum, and decrees a monition for the payment of it; but if either party is dissatisfied with the report of the registrar, on any item of the bill, the objection may be brought before the court for its decision. The regular charges are, however, so well known and established, and the registrars of the several courts, who are acting under the sanction of an oath of office, are so experienced and respectable, being generally selected out of the body of proctors, on the ground of their high character and professional knowledge, that an exception to their report as to costs rarely occurs.(x) In taxing costs, the expense of \*the monition for payment is always added, [ \*532 ] and if the monition is not obeyed in the first instance, the further expense seems to fall by a just and even necessary consequence upon that party by whose neglect or refusal to obey in the first instance it has been incurred.(y) The court will not direct the deputy registrar to allow the solicitor of a party who has a new proctor, to be present at the examination by consent of the bill of costs of his former proctor, such an attendance being unusual and unnecessary to the purposes of justice.(z)

*Payment of Costs, how enforced.*—The payment of the costs thus taxed as between party and party is enforced by the process of contumacy, *significavit*, and attachment; but the costs incurred by a party in a cause, and due to his own proctor, cannot be taxed by the judge, nor the payment thereof be enforced by the court; the proctor must recover his bill of costs against his client by an action at law.(a)

A proctor, registrar, or apparitor, cannot sue in the spiritual court for his fees, nor the judge commit for non-payment of them.(b)

The ecclesiastical court has no jurisdiction to decide what is due, nor to enforce payment with respect to costs between proctor and client, incurred in a contested suit. Even in common form business, in which the proctor is acting more in the character of an officer of the court, and for which there is an established table of fees, and which is subject therefore, to more direct control, the court has of its own authority no such power; but where costs are given against a party, the court, in order to carry its sentence into execution, is empowered to tax the costs, and to enforce the payment; but as between proctor and client, the court has no such authority; it can neither decide what shall be received nor what shall be paid, nor can it enforce payment. The proctor can only recover his charges by action at law, when he must prove the items of his bill. All that the

(x) Rep. Eccl. Comm. 20.

(y) 2 Addams, 351.

(z) *Peedle v. Evans*, 1 Hagg. Eccl. R. 684.

(a) Rep. of Eccl. Comm. 20.

(b) *Pollard v. Gerard*, *Ld. Raym.* 703; *Pearson v. Campion*, 1 Dougl. 629; *Johnson v. Lee*, 5 Mod. 238.

ecclesiastical court can do, is upon the application of the client, to [ \*533 ] refer the bill to the registrar for \*examination. The court does this for one of two purposes; first, to enable the suitor to judge what he will pay or tender before bringing the matter into a court of law by refusal of payment;—but this is not properly a taxation of the bill; the registrar does not report the bill to the court; the judge does not tax the bill, the proctor first making oath that the amount reported has been necessarily expended; nor does the court issue a monition for the payment of the sum taxed. It has no such authority between proctor and client. The reference to the registrar is merely by consent and in aid of justice, and for the convenience of suitors; and neither party is bound as to the amount by the registrar's examination.(c)

*Costs between Husband and Wife in Matrimonial Suits.*—In suits instituted either by the husband or the wife, the wife is a privileged suitor as to costs and alimony.(d) The principle on which the rule is founded is, that under the ancient law of this country the wife is presumed to have no separate fortune, and that by marriage the whole property is supposed by law to be in the husband. If the wife, therefore, is under the necessity of living apart, it is also necessary that she should be subsisted during the pendency of the suit, and that she should be provided with the means of defence.(e) After an appearance has been given on the part of the husband, and a libel and issue confessing the marriage, but otherwise contesting the suit, the cause in ordinary cases is arrived at that stage when the proctor for the wife usually prays costs. Where the foundation of the rule is taken away, the rule itself ceases. Therefore, where the wife has an income competent to her support, and the maintenance of the suit, she is not a privileged suitor. The general rule is, that the husband must pay the costs incurred by the wife in a suit for a divorce. The costs of the wife were directed to be taxed against the husband, although the wife had a separate income of 236*l.* per annum, the husband being a captain in the navy, having an income averaging when employed [ \*534 ] 510*l.* a year, there being no \*rule for apportioning costs between the husband and wife, where the income of both is small.(f) To relieve the husband from the payment of the wife's costs, it must appear that the wife has an income correspondent to her own expenses and the necessary expenses of the suit, for both must appear.(g) The circumstances of the wife living with her mother does not alter the case, for the mother is not bound to maintain her.(h) In matrimonial suits the general rule is, that the wife has a right to have her costs taxed at all times.(i) The object of the law in permitting a taxation *de die in diem* must obviate any inconvenience or delay that might otherwise arise in the progress of the cause, from the wife's want of funds to meet the costs. But where a suit by the wife against the husband had abated by the wife's death, the court

(c) By Sir John Nicholl, *Peddle v. Toller*, 204.

3 Hagg. Eccl. R. p. 287, 288; *Peddle v. Evans*, 1 Hagg. Eccl. R. 684; *Cheale v. Cheale*, ib. 375.

(d) *Fitzgerald v. Fitzgerald*, 1 Leo, 649; *Bird v. Bird*, ib. 209.

(e) *Wilson v. Wilson*, 2 Hagg. Conn. R.

(f) *Belcher v. Belcher*, 1 Curteis, 444.

(g) *Davis v. Davis*, cited 2 Hagg. Conn. R. 203; 1 Curteis, 445.

(h) *Bevor v. Bevor*, 3 Phill. R. 264.

(i) ib. 262.

refused at the petition of the proctor, whose appointment was extinct, to direct the costs incurred by the wife to be paid by the husband.(k) Costs were taxed *de die in diem* between husband and wife, though she had a separate income.(l)

*Costs where Wife has Separate Estate.*—In a suit for restitution of conjugal rights, the wife having a separate property of her own, is liable to pay her own costs.(m) When the wife has separate means, which the court deems sufficient for her defence and subsistence, she is not entitled to alimony nor costs during suit; she then stands on the common footing of a litigant party, and on proving her case has a *prima facie* right to costs. It is, however, discretionary with the court, on a consideration of all the circumstances, to relax the rule.(n) Where the facts were that the wife had the enjoyment of 160*l.* a year, and the husband could only do occasional duty as a clergyman, was frequently prevented from that by illness, and had no income or property whatever, neither costs nor alimony were allowed in a suit of separation by reason of cruelty and adultery brought by the wife against the husband.(o) So where there was almost an equality in the income of the parties, and the property of the wife, which had been dissipated, was done so with her assistance, the court rejected an application on the part of the wife, in a suit brought by her husband for adultery, that she might be allowed to have her costs taxed against the husband during the proceedings.(p) A question of this kind was lately discussed; the estates of the husband were considerable, but much encumbered; he had however an income much greater than the separate income of his wife, which was derived from several sources. No application for alimony or costs had been made in the courts below, i. e. in the Consistory Court of London, or the Arches Court. In the Court of Delegates three bills of costs were brought in, and the proctor for the wife prayed to be heard on taxation. An act on petition was gone into, and the court finally acceded to the prayer of the wife, so far only as regarded the costs in the High Court of Delegates; but it was generally understood that the judges were much divided in opinion on the subject.(q)

It seems that it would be competent to the judge, in a case of gross fraud, to condemn the asserted wife in costs, at the termination of the suit.(r) This was done in a case where the costs were prayed in the libel, and the marriage was declared void on the ground of fraud practised upon a person of great imbecility of mind.(s) The court refused to tax the costs of the wife against the husband, where he was possessed of no property whatever, and had been shortly before discharged from prison by an order of the Insolvent Debtors' Court, although the husband was not proceeding *in forma pauperis*, but

(k) *Cheale v. Cheale*, 1 Hagg. Eccl. R. 375.

(l) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. Suppl. 133.

(m) *Holmes v. Holmes*, 2 Lee, 90.

(n) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 787.

(o) *Davis v. Davis*, 2 Hagg. Cons. R. 204, n.

(p) *Wilson v. Wilson*, 2 Hagg. Cons. R. 203.

(q) *Westmeath v. Westmeath*, cited 2 Lee, 93, n. (a).

(r) 1 Lee's R. 211, n. (a).

(s) *Portsmouth v. Portsmouth*, 1 Hagg. Eccl. R. 365. 374; ante, pp. 185-189. See 3 Addams, 63. 67.

declined, at his prayer, to fix any day for the hearing of the cause, the wife insisting upon the previous payment of costs.(t)

*Security for Costs.*—In all cases the court may upon application [ \*536 ] made to it direct security for costs to be given by \*either or all of the parties.(u) The wife cannot as a matter of course enforce this rule in a matrimonial suit; and in a suit for separation for the husband's adultery, the court will not direct the husband to give security for costs, on suggestion, unsupported by affidavits, that he was going abroad.(x)

*Appeal in respect of Costs.*—Whether an appeal will or will not lie from costs alone has occasionally been discussed in the ecclesiastical courts. There are *dicta* both ways, and perhaps different rules in different jurisdictions. The result of the cases is, that there is no absolute rule, that the question is mixed up with and must depend on the whole circumstances; such appeals, however, are much discouraged, especially where they are of trifling amount, and evidently vexatious.(y) Costs in the courts below were not allowed to be taxed in the Court of Appeal as between husband and wife, or before sentence as between party and party.(z) On an appeal from a grievance, the court of appeal cannot enforce the payment of the costs incurred in the inferior court.(a)

It is the policy of the law to protect both parties—respondents as well as appellants—from useless litigation; and no party should be excited to appeal without the ordinary check at least of his own costs, and possibly those of the respondents. The court therefore will discountenance an agreement on the part of the proctor to accept only disbursements from his client as an inducement to appeal.(b)

*Of Appeals.*—Every subject has a right to appeal, and every superior court enabled by law to hear and determine such appeal is obliged to receive the same, and after such appeal duly made, the [ \*537 ] inferior court is restrained from proceeding \*any further in the cause.(c) The consistory court of each archbishop, and every bishop of every diocese within this realm, is holden before the bishop's chancellor in the cathedral church, or before his commissary in places of his diocese far remote and distant from the bishop's consistory. The bishop's chancellor or his commissary is the judge, and from his sentence an appeal lies by stat. 24 Hen. 8, c. 12, to the archbishop of each province respectively.(d) The diocesan courts take cognizance of all matters arising locally within their

(t) *Walker v. Walker*, 1 Curteis, 564.

(u) Order of Court, 3d. Sess. Hil. Term, 1830, a. 13, 2 Hagg. Eccl. R. p. xvi.

(x) *Turton v. Turton*, 3 Hagg. Eccl. R. 345.

(y) *Lloyd v. Poole*, 3 Hagg. Eccl. Rep. 477. The rule in courts of equity is, that an appeal for costs merely is not to be strictly adhered to, if a sound distinction can be made; *Owen v. Griffiths*, 1 Ves. Sen. 250, in which Lord Hardwicke said, "Yet if it were to be laid open generally, that an appeal might be for costs, it would cause that general inconvenience to which a particular in-

convenience ought to give way." See *Widman v. Kent*, 1 Br. C. C. 141. See *Beames on Costs*, 162, 189, 192, 193.

(z) *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. Suppl. 133.

(a) *Brisco v. Brisco*, 3 Phill. R. 38.

(b) *Peddle v. Toller*, 2 Hagg. Eccl. R. 292, 293.

(c) 4 Inst. 340.

(d) The two new sees of Manchester and Rippon are subject to the metropolitan jurisdiction of the archbishop of York. See 6 & 7 Will. 4, c. 77.

respective limits, with the exception of places subject to peculiar jurisdiction.(e) They may decide all matters of spiritual discipline, and they may declare marriages void, pronounce sentence of separation *a mensa et thoro*, try the right of succession to personal property, and administer the other branches of ecclesiastical law.(f)

*Order of Appeal.*—In maintenance of the ancient law of the land, and the statutes(g) often made to support it, the stat. 24 Hen. 8, c. 12, declared that all causes of matrimony and divorces should be heard and finally determined within the king's jurisdiction and authority and not elsewhere, notwithstanding any inhibitions, appeals, or other process from the see of Rome or elsewhere. The order of appeal was directed to be in the following manner: from the archdeacon or his official to the bishop of the diocese, from the bishop or his commissary to the archbishop of the province, from the archdeacon of any archbishop or his commissary to the court of arches or audience of the same archbishop, and from the court of arches or audience to the archbishop of the same province. All these respective appeals were to be within fifteen days after judgment or sentence, and such as were before the archbishop were to be determined without any further appeal.(h) But, as we shall presently see, there is a further appeal to the privy council.(i)

\*Though the regular appeal from a jurisdiction not peculiar but subordinate is to the diocesan, yet if the judge [ \*538 ] of the subordinate and diocesan courts be the same person, the appeal

(e) See post, p. 538. 540.

(f) Rep. Eccl. Comm. 12.

(g) See Reeves's Hist. of Law, vol. ii. 157. 376. 379; vol. iii. 162. 164.

(h) 24 Hen. 8, c. 12, ss. 5-8.

(i) See post, p. 544. In pursuance of the recommendations of the ecclesiastical commissioners for England, contained in their several reports, dated 17 March, 1835; 4 March, 20 May and 24 June, 1836, provisions are in progress for altering the bounds of several dioceses. The ecclesiastical commissioners of England may bring schemes before the king in council for carrying into effect these recommendations, and such commissioners are authorised to propose that all parishes, churches or chapelries, which are locally situate in any diocese, but subject to any peculiar jurisdiction, other than the jurisdiction of the bishop of the diocese, in which the same are locally situate, shall be only subject to the jurisdiction of the bishop of the diocese, within which such parishes, churches, or chapelries are locally situate. 6 & 7 Will. 4, c. 77, s. 10. Such schemes may be ordered in council to be carried into effect, registered and gazetted, and when registered and gazetted, such orders shall have full effect for all purposes. Copies of the orders are to be laid before parliament. 6 & 7 Will. 4, c. 77, ss. 12, 13, 14, 15.

By 6 & 7 Will. 4, c. 77, s. 19, all archdeacons throughout England and Wales

shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding.

The stat. 6 & 7 Will. 4, c. 77, s. 20, after reciting that it may be expedient to consider the state and jurisdiction of all the ecclesiastical courts of England and Wales, enacts, that nothing therein contained, nor any order in council made under that act, either for altering the limits of either of the existing provinces, or the boundaries of any existing diocese or archdeaconry, or for uniting any existing sees, or for creating any new bishopric or archdeaconry, or for appointing any registrar, or for any other purpose whatever, shall for one year after the passing of that act, or if parliament should be then sitting, till the end of the then session of parliament, in any manner affect the jurisdiction, power or authority of any or either of the existing ecclesiastical courts in England or Wales, or the extent or limits thereof; but that during such period as last aforesaid, every such court shall continue in all matters whatsoever arising within its present limits to exercise the same jurisdiction as theretofore by law allowed. These temporary provisions have been continued from time to time, and are now extended until the 1st August, 1840; and if parliament shall be then sitting, until the end of the then session of parliament. 2 & 3 Vict. c. 55, s. 1.



may be *per saltum* to the metropolitan, but the reason must appear by the formal instruments in the cause; for if the bishop thinks fit to appoint the same individual to both offices, they must be considered as consolidated and merged, otherwise the absurdity and extreme inconvenience of appealing from the same person to the same person would be introduced.(k)

*Different Kind of Peculiars.*—The court of peculiars is a branch of and annexed to the Court of Arches. It has jurisdiction over all [ \*539 ] those parishes dispersed through the province \*of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction and subject to the metropolitan only.(l) In the other peculiars, the jurisdiction is exercised by commissaries, from whose sentence an appeal lies to the Court of Arches.(m) The very term peculiar supposes an exemption from ordinary jurisdiction. Peculiars are exempt jurisdictions, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own.(n) There are three sorts of peculiars.

1st. Royal peculiars, which were anciently exempt from the jurisdiction not only of the diocesan, but of the archbishops also, and which were immediately subordinate to the see of Rome until placed under the jurisdiction of the crown by stat. 24 Hen. 8, c. 12, and all appeals from them were formerly directed to the court of delegates,(o) and now to the privy council.(p)

2d. The second sort of peculiars are those in which the bishop has no concurrent jurisdiction, and are exempt from his visitation. These have their appeals directly to the archbishop, and not to the diocesan, within the circle of whose diocese they are locally situated.(q)

Where an archdeacon has a peculiar jurisdiction, he is totally exempt from appeal to the bishop, and is not bound by the stat. 24 Hen. 8, c. 12, which applies to the ordinary(r) cases of archdeacons presiding in jurisdictions where they are subject to the superior jurisdiction of the bishop, and not to cases of peculiars.(s) By the general law, the appeal from a peculiar, and more especially from the peculiar of a dean and chapter having exclusive jurisdiction to hear and determine all causes, without any concurrent jurisdiction whatever, and being exempt from the visitation of the diocesan, lies to the court of the archbishop. An appeal from the dean and chapter of [ \*510 ] Exeter lies to the Court of Arches, and not to the \*Consistory Court of Exeter.(t) We have already adverted to the proposed alterations of the boundaries of ecclesiastical jurisdictions, but any peculiar belonging to either of the archbishops on the 13th August, 1836, except as may be otherwise provided by any order in council made under that act, remains subject to the same authority

(k) *Beare v. Jacob*, 2 Hagg. Eccl. R. 257. See *Cart v. Marsh*, Str. 1080; *Lee's case*, Carth. 169; 1 Burn's Eccl. Law, 8th ed. p. 60.

(l) 3 Bl. Comm. 65.

(m) 1 Phill. R. 202, n.

(n) Ayliffe Parer. 417; Gibs. Cod. 1050; 401. Abr.

(o) 3 Phill. R. 245.

(p) See post, p. 544.

(q) 3 Phill. R. 245.

(r) *Robinson v. Godsalve*, 1 Raym. 193; Gibs. Cod. 1036.

(s) *Parham v. Templer*, 3 Phill. R. 243.

(t) *Parham v. Templer*, 3 Phill. R. 223; 11 Mod. 6.

and jurisdiction as before.(u) Appeals do not lie from one co-ordinate to another, but from a subordinate to a superior authority. If the bishop appoint a commissary for the more remote and distant parts of an extensive diocese, who is called *Commissarius Foraneus*, the appeal will not lie from such commissary's decree to the chancellor of the consistorial court of the diocese, but immediately to the metropolitan court.(x)

3d. There is a third description of peculiars which is subject to the bishop's visitation, and liable to his superintendence and jurisdiction, in these the appeal lies from the peculiar to the diocesan.(y)

*Court of Arches.*—The Court of Arches is chiefly a court of appeal from the courts of the several bishops or ordinaries within the province of Canterbury, and its appellate jurisdiction extends to all causes or suits relative to wills, intestacies, tithes, church rates, *marriages*, and other matters cognizable in these courts.(z) It has no jurisdiction to determine the allowance to be made for the maintenance and education of minors.(a)

This court has no jurisdiction to *cite generally*, except in the cases specified in the statute 23 Hen. 8, c. 9,(b) upon which the jurisdiction of this court is entirely settled.(c) An \*ordinary, commissary, or official, or other judge offending against this [ \*541 ] statute is liable to double damages and costs, and a forfeiture of 10*l.* for every person cited, one-half to go to the crown and the other to the party suing for it.(d)

(u) Stat. 6 & 7 Will. 4, c. 77, s. 21. See ante, p. 538, n.

(x) 4 Inst. 338; *Parham v. Templer*, 3 Phill. R. 244.

(y) *Parham v. Templer*, 3 Phill. R. 246; see *Johnson v. Lee*, Skinn. R. 539.

(z) Report of commissioners to inquire into courts of justice, 16th May, 1823, p. 4, cited 1 Hagg. Ecccl. R. 4.

(a) *Fleet v. Holmes*, 2 Lee's R. 140.

(b) *Hughes v. Herbert*, 2 Lee's R. 287. See 94th canon, Gibs. Cod. 1050.

(c) *Butler v. Dolben*, 2 Lee's R. 316.

That no manner of person shall be from henceforth cited and summoned, or otherwise called to appear by himself or herself, or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocese or peculiar jurisdiction, where the person which shall be cited, summoned, or otherwise (as is aforesaid) called, shall be inhabiting and dwelling at the time of awarding or going forth of the same citation or summons; except that it shall be for, in, or upon any of the cases or causes hereafter written; that is to say, for any spiritual offence or cause committed or done, or omitted, foresewed, or neglected to be done contrary to right or duty by the bishop, archdeacon, commissary, official, or other persons having spiritual jurisdiction, or being a spiritual judge, or by any other person or persons within the diocese or other jurisdiction, whereunto he or she shall be cited or otherwise lawfully

called to appear and answer, (23 Hen. 8, c. 9, s. 2.)

And except also it shall be by or upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself or herself grieved or wronged by the ordinary, judge or judges of the diocese or jurisdiction, or by any of his substitutes, officers, or ministers, after the matter or cause there first commenced and begun to be showed unto the archbishop or bishop, or any other having peculiar jurisdiction, within whose province the diocese or place peculiar is; or in case that the bishop or other immediate judge or ordinary dare not, nor will not, convent the party to be sued before him (see *Cotterill v. Mace*, 3 Hagg. Ecccl. R. 747); or in case that the bishop of the diocese, or the judge of the place within whose jurisdiction or before whom the suit by this act should be commenced and prosecuted, be party directly or indirectly to the matter or cause of the same suit; or in case that any bishop, or any inferior judge having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop, bishop, or other superior ordinary or judge to take, treat, examine, or determine the matter before him, or his substitute, and that to be done in cases only where the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable, (Ibid. s. 3.)

(d) 23 Hen. 8, c. 9, s. 3.

*Letters of Request.*—The Court of Arches, by statute 23 Hen. 8, c. 9, is empowered to take original cognizance by virtue of letters of request, of such causes as the civil and canon law allowed the inferior judge to devolve to the superior, which are those that are called arduous causes, of which *matrimonial* causes were always esteemed the chief; the statute vested the power of devolving in the judge, without mentioning consent either of the bishop or parties—in fact the bishop's consent was never required; and if the party's consent had ever been deemed necessary; there hardly could be a cause commenced in that court by request, for the defendant almost constantly desires as many opportunities of appealing as possible for delay. As to the discretion of the Arches Court, whether it shall accept or refuse [ \*542 ] letters of request when \*granted by a proper judge, the delegates held in the case of *Pelling v. Whiston*(e) that the dean of the arches was bound to receive them *ex debito justitiæ*, but that it was in the discretion of the inferior judges whether they would grant them. Letters of request, offered by two ecclesiastical judges conjointly, are not invalid on that account.(f)

Letters of request ordinarily lie where the appeal lies, and for this reason:—The judge who signs them, by so doing, waiving or remitting his own court, (which is all that he can do), the jurisdiction which, generally speaking, at once alone attaches, is that of the appellate court. Thus from all peculiars (i. e. places exempt from episcopal jurisdiction,) both appeals and letters of request lie at once to this the Metropolitan Court; for it is the jurisdiction of this court [ \*543 ] that at \*once alone attaches in those cases. For instance, where an archdeacon, who has a peculiar, waives or remits his court, there is no other court which can take cognizance of the cause than this the Court of Arches; to which accordingly

(e) 1 Com. Rep. 190; 2 Gibs. 1007, in which case the refusal of a citation in a libel of heresy was holden to be a good ground of appeal to the delegates.

*Form of Letters of Request for instituting a suit for a Divorce in the Arches Court instead of Diocesan Court.*

Whereas A. B., of the parish of —, in the county of Middlesex, in the diocese of London, Esq., doth intend to commence and prosecute against his wife, E. of the same parish of —, and county of —, and diocese of —, a certain cause or suit of divorce or separation from bed, board, and mutual cohabitation by reason of adultery by her the said E. committed, and for that purpose hath requested me the worshipful —, Vicar General of the Right Rev. Father in God, —, by divine permission Lord Bishop of —, and official principal of his Consistorial and Episcopal Court of —, to grant to him letters of request that he may apply for the original citation or decree in the said cause of suit in the Arches Court of Canterbury; and whereas the applying for the said original citation or decree in the arches court of Canterbury will, as it is represented to me, be of advantage to all parties, not only

from the able assistance they can have of counsel in the said arches court of Canterbury, but as the same will be also a more ready and expeditious way for the hearing and final determining the said cause: these are therefore, at the decree of the said —, to request, and I do hereby request, the Right Honourable —, doctor of law, official principal of the said arches court of Canterbury, to decree a citation or decree to issue under seal of the said arches court of Canterbury, at the instance of the said —, and thereby to cite her the said — to appear personally before him or his lawful surrogate, or other competent judge in this behalf, and answer to the said — in his aforesaid cause or suit of divorce by reason of adultery, and to hear and finally determine the said cause according to law. In witness whereof I have hereunto set my hand and seal this — day of —, in the year of our Lord —.

(L. S.)

[Signature of the judge of the inferior Court.]

Signed, sealed, and delivered in the presence of —.

2 Chitty's Pr. 497, 498, n.

(f) 2 Lee, 316.

(being also the appellate court) letters of request undoubtedly lie. So again from courts which are not peculiars, but subject to the diocesan, letters of request, generally speaking, go in the same course with appeals for the same reason. Thus where an archdeacon, who has no peculiar, waives or remits his court, the jurisdiction that immediately attaches is that of the diocesan court; to which court accordingly letters of request lie, (being here also again the appellate court,) repeatedly so decided. In short, where the inferior ordinary waives or remits his court, the appellate court, generally speaking, is alone competent to take cognizance of the cause; and this it is which has given rise to the notion—a notion generally speaking perfectly correct—that letters of request go in the same course with appeals; or in other words, that the inferior ordinary must make request, or instance, of jurisdiction to that judge, into whose court the cause must have been appealed had he himself proceeded in it in the first instance. Letters of request from a bishop's *commissary* go in the same course with the *appeal*, that is, not to the diocesan but the Court of Arches.<sup>(g)</sup>

*Court of Delegates.*—Appeals to the see of Rome were abolished by statute 24 Hen. 8, c. 12, by which causes commenced before either of the archbishops or brought before them by way of appeal were to be finally determined by them without any further appeal. By statute 25 Hen. 8, c. 19,<sup>(h)</sup> for lack of justice (as the act expresses it) in any of the archbishop's courts it was made lawful for the parties aggrieved to appeal to the king in chancery, and upon every such appeal it was directed that a commission should issue under the great seal to such persons as should be named by the king to hear and definitively determine such appeals. The \*same right of appeal was given by the same statute from certain monas- [ \*544 ] teries and other places, which, by the grants both of kings and popes, were exempt from all ordinary jurisdiction. Each appeal was referred to a separate and distinct commission nominated for the occasion. This statute was the origin of the High Court of Delegates, which was the appellate jurisdiction from the courts of the archbishops of Canterbury and York, and from the ecclesiastical courts within the royal peculiars in each province. There was no appeal to the house of lords from a sentence of the court of delegates;<sup>(k)</sup> but the decision of that court was final as of right, although in very special cases a commission of review was sometimes, though very rarely, granted on petition, addressed to the king in council, and referred for decision to the lord chancellor.

Although the court of delegates has been abolished, and another tribunal substituted for it, there are some points respecting the former court which may be applicable to the latter, and therefore proper to notice. A commission of delegates might be granted at the instance of a person interested, though not an original party in the cause.<sup>(l)</sup> A suit commenced before the delegates did not abate by the death of

(g) *Burgoyne v. Free*, 2 Addams, 405; 28 Geo. 3, c. 32.  
see *Taylor v. Morley*, 1 Curteis, 405.

(k) *Saul v. Wilson*, 2 Vern. 118; and see 2

(h) In Ireland, upon appeal from the archbishop's court to the king in chancery, Swanst. 326.

(l) *Jones v. Bougett*, 1 Atk. 298.  
delegates are appointed under Irish statute

either of the parties, for the ecclesiastical law is their rule, and by the course of that law there is no abatement of the suit in such case.(m) If the delegates exceeded their authority, or proceeded in matters not properly within their consuance, they might be prohibited by the king's temporal courts.(n) On an appeal on a collateral point, the court of delegates, instead of remitting the cause to the arches, might retain it at the request of the party, and hear it on the merits.(o) The delegates were bound to proceed according to the ecclesiastical laws, and could neither fine nor imprison.(p)

[ \*545 ] *Judicial Committee of Privy Council substituted for Court of Delegates.*—The stat. 2 & 3 Will. 4, c. 92, s. 1, enacts, that after the 1st day of February, 1833, it shall be lawful for every person who might theretofore, by virtue of either of the said acts 25 Hen. 8, c. 19, and 8 Eliz. c. 5, have appealed to the high court of chancery, to appeal to the king in council, within such time, in such manner, and subject to such orders and regulations, for the due and more convenient proceeding, as shall seem meet and necessary, and upon such security, if any, as shall from time to time be directed by order in council; power is given to the king in council to proceed to hear and determine every appeal to be made by that act, and to make all such judgments, orders, and decrees in the matter of such appeal as might theretofore have been made by the court of delegates; and every such judgment, order and decree so to be made, shall have such and the like force and effect in all respects whatsoever as the same respectively would have had if made and pronounced by the High Court of Delegates. Every such judgment, order, and decree shall be final and definitive, and that no commission shall thereafter be granted or authorized to review any judgment or decree to be made by virtue of that act.

*Judicial Committee, of whom composed.*—The stat. 3 & 4 Will. IV. c. 41, enacts, that the president for the time being of his majesty's privy council, the lord high chancellor of Great Britain for the time being, and such of the members of his majesty's privy council as shall from time to time hold any of the offices following, that is to say, the office of lord keeper or first lord commissioner of the great seal of Great Britain, lord chief justice or judge of the Court of King's Bench, master of the rolls, vice-chancellor of England, lord chief justice or judge of the Court of Common Pleas, lord chief baron or baron of the Court of Exchequer, judge of the Prerogative Court of the Lord Archbishop of Canterbury, judge of the High Court of Admiralty, and chief judge of the Court in Bankruptcy, and also all persons members of his majesty's privy council who shall have been president thereof or held the office of lord chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned, [ \*546 ] shall form a \*committee of his majesty's said privy council, and shall be styled "The Judicial Committee of the Privy Council:" but his majesty may from time to time, by his sign manual,

(m) Vent. 133; *Polysphen's case*, 2 Keb. 714, 777; Hedl. 108; Cro. Jac. 483; *Lodge's case*, 1 Leon. 277, 278.  
(n) *Moore*, 462, 463 Latch, 85, 86. 229;

Bac. Abr. Eccl. Courts, (A.) 9.

(o) *Williams v. Osborne*, Str. 80.

(p) 4 Inst. 334; stat. 13 Car. 2, c. 12; Com. Dig. Prerogative, (D. 14.)

appoint any two other persons, being privy councillors, to be members of the said committee.

*All Appeals to be referred to the Committee.*—All appeals or complaints in the nature of appeals whatever, which, either by virtue of that act, or of any law, statute, or custom, may be brought before his majesty or his majesty in council, from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, are to be referred by his majesty to the said judicial committee of his privy council, and that such appeals, causes and matters shall be heard by the said judicial committee, and a report or recommendation thereon shall be made to his majesty in council for his decision thereon as theretofore, in the same manner and form as had been theretofore the custom with respect to matters referred by his majesty to the whole of his privy council or a committee thereof (the nature of such report or recommendation being always stated in open court.)(g)

*Matter to be heard in presence of Four Members of the Committee.*—No matter shall be heard, nor shall any order, report, or recommendation, be made, by the said judicial committee, in pursuance of that act, unless in the presence of at least four members of the said committee; and that no report or recommendation shall be made to his majesty unless a majority of the members of such judicial committee present at the hearing shall concur in such report or recommendation; but his majesty, if he shall think fit, may summon any other of the members of his said privy council to attend the meetings of the said committee.(r)

*Evidence may be taken Viva Voce, or upon written Depositions.*—The said judicial committee, in any matter which shall be referred to such committee, may examine witnesses by word of mouth, (and either before or after examination by deposition,) or direct that the depositions of any witness shall be taken in writing by the registrar of the said privy council, \*or by such other person or persons, [ \*547 ] and in such manner, order and course, as his majesty shall appoint and direct; and that the said registrar and such other person or persons so to be appointed shall have the same powers as are now possessed by an examiner of the high court of chancery, or of any court ecclesiastical.(s)

*Power to order particular Witnesses to be examined, and to remit Causes for Rehearing.*—In any matter which shall come before the judicial committee, such committee may direct that such witnesses shall be examined or re-examined, and as to such facts as to the said committee shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter; and his majesty in council on the recommendation of the said committee, upon any appeal, may remit the matter which shall be the subject of such appeal to the court from the decision of which such appeal shall have been made, and at the same time direct that such court shall rehear such matter,

(g) 3 & 4 Will. 4, c. 41, s. 3.  
(r) Ib. s. 5.

(s) Ib. s. 7.

in such form, and either generally or upon certain points only; and upon such rehearing take such additional evidence, though before rejected, or reject such evidence before admitted, as his majesty in council shall direct; and further, on any such remitting or otherwise, his majesty in council may direct that one or more feigned issue or issues shall be tried in any court in any of his majesty's dominions abroad, for any purpose for which such issue or issues shall to his majesty in council seem proper.(t)

*Witnesses to be examined on Oath, and to be liable to Punishment for Perjury.*—Every witness who shall be examined in pursuance of that act shall give his or her evidence upon oath, or if a Quaker or Moravian upon solemn affirmation, which oath and affirmation respectively shall be administered by the said judicial committee and registrar, and by such other person or persons as his majesty in council or the said judicial committee shall appoint; and that every such [ \*548 ] witness \*who shall wilfully swear or affirm falsely shall be deemed guilty of perjury, and shall be punished accordingly.(u)

*Power of the Committee as to Trials, Admission of Evidence, &c.*—The judicial committee may direct one or more feigned issue or issues to be tried in any court of common law, and either at bar, before a judge of assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as was then done by the high court of chancery.(v)

It is in the discretion of the judicial committee to direct that, on the trial of any such issue, the depositions already taken of any witness who shall have died, or who shall be incapable to give oral testimony, shall be received in evidence; and further, that such deeds, evidences, and writings shall be produced, and that such facts shall be admitted, as to the said committee shall seem fit.(x)

The judicial committee may make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of any such issues as aforesaid, as the lord chancellor or the court of chancery has been used to make respecting the admission of witnesses upon the trial of issues directed by the lord chancellor or the court of chancery.(y)

The judicial committee may direct one or more new trial or new trials of any issue, either generally or upon certain points only; and that in case any witness examined at a former trial of the same issue shall have died or have, through bodily or mental disease or infirmity, become incapable to repeat his testimony, the committee may direct that parol evidence of the testimony of such witness shall be received.(z)

Powers given to certain courts therein mentioned to enforce, and all the powers and provisions contained in the acts 13 Geo. III. c. 63, and 1 Will. IV. c. 22, or either of them, for the examination of witnesses by commission, upon interrogatories and otherwise, shall

(t) 3 & 4 Will. 4, c. 41, s. 8.  
s. 9.  
s. 10.

(x) Ib. s. 11.  
(y) Ib. s. 12.  
(z) Ib. s. 13.

extend to and be exercised by the \*said judicial committee in all respects as if such committee had been therein [ \*549 ] named as one of his majesty's courts of law at Westminster.(a)

*Costs to be in the discretion of the Committee.*—The costs incurred in the prosecution of any appeal or matter referred to the said judicial committee, and of such issues as the same committee shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the aforesaid registrar, or such other person or persons, to be appointed by his majesty in council or the said judicial committee, and in such manner as the said committee shall direct.(b)

*Decrees to be Enrolled.*—The orders or decrees made in pursuance of any recommendation of the said judicial committee, in any matter of appeal from the judgment or order of any court or judge, shall be enrolled, for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations, as his majesty in council shall direct.(c)

*Committee may refer Matters to Registrar in same Manner as Matters are by the Court of Chancery referred to a Master.*—The committee may refer any matters to be examined and reported on to the aforesaid registrar, or to such other person or persons as shall be appointed by his majesty in council or by the said judicial committee, in the same manner and for the like purposes as matters are referred by the court of chancery to a master of the said court; and that for the purposes of this act the said registrar and the said person or persons so to be appointed shall have the same powers and authorities as are possessed by a master in chancery.(d)

*The Crown may appoint Registrar.*—The crown may appoint the registrar of the privy council, as regards the purposes of that act, and direct what duties shall be performed by such registrar.(e)

*Attendance of Witnesses, and Production of Papers, &c.*—The president for the time being of the said privy council may require the attendance of any witnesses, and the production of \*any [ \*550 ] deeds, evidences, or writings, by writ to be issued by such president in such and the same form, or as nearly as may be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum* was then issued by the court of King's Bench at Westminster; and that person disobeying any such writ so to be issued by the said president shall be considered as in contempt of the said judicial committee, and shall also be liable to such and the same penalties and consequences, as if such writ had issued out of the said court of King's Bench, and may be sued for such penalties in the said court.(f)

*Time of Appealing*—All appeals to his majesty in council shall be within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by his majesty in council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for his majesty in council to alter any usage as to.

(a) 3 & 4 Will. 4, c. 41, s. 14.

(b) *Ib.* s. 15.

(c) *Ib.* s. 17.

(d) *Ib.* s. 17.

(e) *Ib.* s. 18.

(f) *Ib.* s. 19.



the time of making appeal, and to make any order respecting the time of appealing to his majesty in council.(g)

The provision for enabling the judicial committee to enforce its decrees has been already mentioned.(h)

*Attendance of Registrar.*—Subject to such orders as should be made by the king in council, the present registrar of the High Court of Admiralty was authorised to attend, either in person or by deputy, the hearing by the judicial committee of all causes and appeals which would have been heard by any court or commission, which such registrar was entitled to attend, in person or by deputy, by virtue of his offices of registrar of the High Courts of Admiralty, Delegates, and appeals for prizes, and likewise subject to any order of his majesty in council, to do all acts, matters and things, that should be found necessary, or had heretofore been done by the said registrar or his deputies in respect of such causes and appeals.(i)

[ \*551 ] \*The surrogates, who have been appointed under the order in council of the 10th of December, 1833, sit in the common hall of Doctors' Commons, on stated days in each term, for forwarding the steps preparatory to hearing the causes which are

(g) 3 & 4 Will. 4, c. 41, s. 20.

(h) *Ib.* s. 28; ante, pp. 497, 498.

(i) *Ibid.* s. 29. By an order of the king in council, dated 9th December, 1833, stating that it is expedient that certain regulations should be made for conducting appeals in prize suits and other suits in the Admiralty Court, as well as such appeals from sentences or orders of any judge of any ecclesiastical court in England, or of the Court of Admiralty in England, as under the acts 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, should be made to his majesty in council, or were then pending; it was ordered and directed that all such appeals or applications, suits or complaints, in the nature of appeals, as aforesaid, shall be conducted in the same manner and form, and by the same persons and officers as theretofore, to the High Court of Admiralty, the High Court of Delegates, or the Lords Commissioners in prize cases respectively. That it should be lawful for any four or more members of the judicial committee of the privy council to appoint such of the advocates of the Arches Court of Canterbury, and of the Court of Admiralty, as then were or thereafter should be duly admitted surrogates of such courts to be surrogates of the said judicial committee, and that it should be lawful for such surrogates, or any of them, in all such appeals or applications, &c., to administer such oaths or affirmations, and perform all such other acts, and to make all such orders for forwarding the said appeals, &c. in their several stages preparatory to the final hearing thereof by the said judicial committee, as should be necessary, or had theretofore been done and performed by the surrogates of the said ~~the~~ Court, and the Court of Admiralty,

in cases of appeals, &c., to such courts respectively, or by the surrogates of the said Lords Commissioners in prize cases, in appeals, suits or complaints in the nature of appeals, prosecuted before the said commissioners. That the present registrar of the said Court of Admiralty, by himself or deputy, and the registrars of the said court for the time being, shall attend the hearing by the judicial committee of all appeals, &c. which, but for the said recited acts, would have been heard by any court or commission that such present registrar was entitled to attend by virtue of his offices of registrar of the High Court of Admiralty, delegates and appeals for prizes; and to transmit and perform all acts and things that shall be necessary, or have heretofore been done by the said registrar or his deputies in respect of such appeals, &c. That upon any appeal, &c. as aforesaid being entered in the registry of the Court of Admiralty, a petition on behalf of the appellants shall be presented to his majesty in council, praying that the said petition and appeal may be referred to the judicial committee to hear the same, and report their opinion thereon; and upon such reference having been made, notice thereof shall be forthwith transmitted to the registry aforesaid.

By an order of the judicial committee, dated 10th December, 1833, the several advocates of the Arches Court of Canterbury, and of the High Court of Admiralty, who then were or thereafter should be duly admitted surrogates of the said courts, were appointed to be surrogates of the judicial committee of the privy council in respect of appeals, and for the purposes mentioned in the order; 2, Knapp. P. C. xx.—xxiv.

to come on at Whitehall, and each sitting is called "The Court of Surrogates of the Judicial Committee sitting in Appeals." The surrogates administer oaths, issue processes, and \*are generally as substitutes to the committee, on furtherance of [ \*552 ] the appeals from the courts of Doctors' Commons.

*Mode of appealing to Judicial Committee.*—To bring an appeal before the judicial committee from any ecclesiastical court, the intention to appeal may be declared in court immediately after the judgment is pronounced, in which case such declaration is recorded by the registrar in the court-book, a course now seldom pursued. If the intention to appeal be not so declared in court, it is necessary for the party conceiving himself aggrieved to reduce into writing, in due form, the matter of the appeal, and within fifteen days next after sentence given, to attend before a public notary, and two witnesses, or before two notaries, and protest, allege, and pray an appeal. The written appeal is then subscribed by the notary and witnesses, and is afterwards presented, together with a petition to the queen in council, praying that the appeal may be referred to the judicial committee, which the proctor prepares, lodged with the registrar of appeals in Doctors' Commons, who thereupon transmits the petition to the clerk of the privy council at Whitehall, in order that it may be laid before the council. The petition being in due course presented to them, and referred to the judicial committee, notice of the reference is sent from the council office to the registrar of appeals, who at the next sitting of appeal in Doctors' Commons before the surrogates, publicly announces the receipt of the notice, and afterwards, by direction of the court, enters the same in the court book, technically called the assignation book. An inhibition will then issue, prohibiting the judge, from whom the cause is appealed, and his registrar and actuary, and the respondent and all others, pending the cause and appeal, from doing or attempting any thing to the prejudice of the appellant so long as the same shall remain undecided, and the respondent will be decreed to appear personally or by his proctor before the committee lawfully appointed at Doctors' Commons on the sixth day after service of inhibition and citation, if it be a court day, otherwise on the court day then next following, to answer to the appellant in the business of the appeal. All further processes and other requisite steps, preparatory to the final hearing of the case \*before [ \*553 ] the judicial committee, are then ordered and expedited, under the authority of the surrogates sitting in appeal, on behalf of the judicial committee, in the same manner as was theretofore done, when appeals lay to the court of delegates.

Cases are to be printed on behalf both of the appellant and respondent, containing a summary of the proceedings down to the time assigned for hearing before the judicial committee. The appellant concludes with humbly hoping that their lordships will be pleased to pronounce for the appeal, reverse the decree appealed from, and retain the principal cause, and pronounce such sentence as the nature of his case may require. The respondent, on the other hand, concludes with humbly hoping that their lordships will be pleased to recommend his majesty to pronounce against the appeal, to confirm the decree appealed from, and retain the principal cause, and therein

to pronounce such sentence as his view of the case may require. And in conclusion, each party frequently adds reasons or legal grounds in support of or in opposition to the appeal. The cases are respectively signed by the counsel retained on each side. With the view to the saving of expense, a joint appendix is usually printed, containing a transcript of such proceeding as may require to be particularly noticed. According to the practice in the Court of Delegates the parties were heard in the same order in which they had been heard in the courts below. This practice has however been altered by the judicial committee; and the practice now is that the appellant's counsel in all cases should begin, the respondent's follow, and one of the appellant's counsel be heard in reply.(j)

*Prohibition to the Judicial Committee.*—A party, who appeals to the judicial committee of the privy council against a decree of an inferior ecclesiastical court is not thereby prevented from applying to the court of Queen's Bench to prohibit the judicial committee from further proceedings in the suit.(k) After sentence in the ecclesiastical court the court of Queen's Bench will not grant a prohibition, unless [ \*554 ] it is shown \*clearly that there was a total want of jurisdiction.(l) It has been assumed by the judges of the court of exchequer that they have jurisdiction to issue a prohibition, if the judicial committee exceed their jurisdiction.(m) But there is no appeal against their decision regarding the practice of their own court although wrong, if they have jurisdiction in the cause.(n) In a suit for a divorce in the Consistory Court in London, the defendant put in an answer under protest, which protest was afterwards overruled; but the court refused to compel the defendant to appear absolutely, or to admit the plaintiff's libel. The plaintiff appealed to the Court of Arches from that decision, but not in due time; and the appeal was dismissed. The plaintiff afterwards applied to the Consistory court to be allowed to correct her libel; but the court refused the application. The plaintiff appealed from the decision to the Court of Arches, who pronounced in favour of the appeal. From that decree the defendant appealed to the king in council, praying that it might be reversed, and the cause retained, and he be dismissed from all observance of justice therein. The plaintiff also prayed that the cause might be retained. The appeal was referred to the judicial committee of the privy council, who reported in favour of the appeal, that the decree ought to be reversed, and the principal cause retained, but the defendant should appear absolutely. The report was confirmed, and the order for the appearance was made and served upon the defendant. On a motion for a prohibition to the judicial committee, it was held, that as the judicial committee had jurisdiction over the cause, and they had retained the cause, this must be taken to be a step taken in the cause;

(j) Knapp, P. C. 45, n.

(k) *The Queen Ex parte Farmer v. Cheserton*, 1 Will. W. & Hodg. 19. See *Ricketts v. Bodenham*, 4 Ad. & Ell. 433-446; *Byerly v. Windus*, 5 B. & C. 1.

(l) *Hart v. Marsh*, 2 Harr. & Woll. 341.

(m) *Ex parte Smyth*, 2 Cr. M. & Rosc. 748; 1 Tyrw. & Gr. 222.

(n) Ibid. As to a prohibition from the Court of Exchequer, see *Llen v. Seymore*, Palmer, 525; *Catesbie's Case*, Lane, 39; Com. Dig. tit. Prohibition (B); Bac. Abr. Prohibition (M); also 3 Bl. Comm. 112; *Jobbin's Case*, Cro. Jac. 535; *Soames v. Rawlings*, 1 Tyr. & Gr. 46; *Grant v. Gould*, 2 H. Bl. 100.

and if wrong, that it was a matter of practice, over which that court had no jurisdiction.(o)

*Mandamus.*—Where a cause has been brought before the judicial committee of the privy council on appeal from the \*Court of Arches, and the judicial committee has decided in favour [ \*555 ] of the appeal, at the same time retaining the principal cause, and ordering the unsuccessful party to appear absolutely, subject to the approbation of the king in council, which approbation has been afterwards given, the court of King's Bench cannot, on a suggestion of error in the decision, issue a mandamus to the privy council to receive a petition for a rehearing of the appeal. Nor will the court issue a prohibition to the committee, on a complaint that they have exceeded their jurisdiction in ordering the party to appear absolutely, it not being shown that they have either transgressed the general law of the land, or interfered in any matter not of ecclesiastical cognizance.(p)

*Right of Appeal, how waived.*—Where a party denies the jurisdiction, he would not be allowed in the principal cause, in which he had never appeared, to appeal from a step in the principal cause.(q) The praying a judge to rescind any order peremptory after appeal from that order. The judge's refusal to accede to such prayer is not itself an appealable grievance, any more than his refusal to permit witnesses to be examined "on the day assigned to propound all facts;" even though such witnesses are actually in court, and are sworn to be necessary witnesses.(r) A party who does acts in furtherance of a sentence bars his right of appealing, and the attendance of the proctor of the party on the taxation of costs is an act amounting to the desertion of an appeal; though one party asserted that such attendance was given with an understanding that it was not to prejudice the prosecution of his appeal, but the other party positively denied any such understanding, and no entry of any such reservation was made on the record.(s) But a protest against an appeal, on the ground that the party (by bringing in an exceptive allegation, subject as alleged to a condition that the question as to the admission should be reserved to the hearing of the cause) had peremptory his right to appeal, was overruled.(t) The right to appeal is \*barred by a defendant [ \*556 ] acquiescing in the admission of the article, by complying with the assignation of the court in giving a negative issue *subsequent* to their admission.(u) The sentence not having been appealed from within the time limited by law, the order to carry that sentence into execution cannot be appealed from.(x)

*Object of Court of Appeal.*—The court of appeal will endeavour in the best way it can to get at the substantial justice of the case, and not allow either party to be injured by the irregularities of the inferior jurisdiction;(y) but put them in the situation in which they would have been if the court below had done right.(z) In considering the proceedings of the inferior jurisdiction, the Court of Arches endea-

(o) *Ex parte Smyth*, 2 C., M. & R. 748; 1 Gale, 274.

(p) *Ex parte Smyth*, 3 Ad. & Ell. 719.

(q) *Herbert v. Herbert*, 2 Phill. R. 447.

(r) *Greg v. Greg*, 2 Addams, 276.

(s) *Lloyd v. Poole*, 3 Hagg. Eccl. R. 482.

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(t) 4 Hagg. Eccl. R. 246.

(u) *Schultes v. Hodgson*, 1 Addams, 105.

(x) *Lewis v. Owen*, 1 Lev. 538.

(y) 2 Phill. R. 394.

(z) *Ibid.* 400.

vours to look the justice of the case, and is not strict as to the proceedings, but there are some irregularities which the court cannot overlook.(a) But to avoid defeating substantial justice, the court will, as far as it can with propriety, disregard mere form. But an appeal for a frivolous sum will be discountenanced by the court, and if vexatious, will be dismissed with costs.(b)

Appeals are sometimes entered with little if any hope of obtaining the reversal of the decision, but to harass the other party with expense and delay, and to extort a compromise.(c) The court has no means of preventing a husband and wife from harassing each other.(d) The only check which can be imposed on improper appeals is the responsibility of counsel under whose advice the appeal is prosecuted, and a condemnation in the whole costs. In matrimonial suits it is incidental to the very nature of the marriage state that vexatious appeals should more frequently occur, as in cases where the wife is proceeded against, and her adultery has been held to be proved, she has a double motive for appealing to a superior jurisdiction, namely, the continuance of alimony *pendente lite*, and the consideration that the expense of the [ \*557 ] appeal in ordinary cases must be borne by the husband. The orders of court, made a few years ago, have tended materially to expedite causes which before, from delay in furnishing instructions to the proctors, generally proceeded at a slower pace. Many short cases are now disposed of in a single term; and it scarcely ever happens that a cause ready for hearing at the end of a term goes off to a following term.(d)

*Appeals of two Sorts.*—Appeals lie from definitive sentences and from interlocutory decrees, or as they are termed, grievances, which may travel through the same course and may occur repeatedly in the same suit.(e) In criminal suits an appeal is allowed to the party prosecuting as well as to the defendant.(f) An interlocutory sentence or decree is that which is pronounced between the beginning and end of the cause; not upon the principal cause, but upon some incidental point, as the admission or amendment of the libel.(g) So many grievances may, in the course of a suit, become causes of appeal, that to enumerate all of them, as observed by Conset,(h) “is not within the bounds of any man’s knowledge or foresight to particularize.” The refusal of a citation may be a grievance and good ground of appeal.(i) It is sometimes a question whether the matter appealed against amount to a definitive sentence or a grievance.(j) All the several acts done on one court day make up but one decree, at least so as to warrant the inhibition’s going as to the whole.(k) No appeal from a sentence lies till final sentence be actually given; when there-

(a) Ibid. 583.

(b) 3 Hagg. Eccl. R. 682.

(c) Rep. Eccl. Comm. 20.

(d) 4 Hagg. Eccl. R. 512.

(d) Rep. Eccl. Comm. 71.

(e) Ibid. 20. It was said by the court to be “the great and incurable grievance in the ecclesiastical courts that parties may appeal from every step, and that causes by the occupation of the court of delegates may be hung up long before an interlocutory decree can be pronounced. The court will in prac-

tice consolidate the steps as much as it can, and will not drive a party to two appeals; *Middleton v. Middleton*, 2 Hagg. Eccl. R. Suppl. 141, n.

(f) *Miller v. Palmer*, 1 Curteis, 550.

(g) Conset, 161.

(h) P. 187.

(i) *Cotterell v. Mace*, 3 Hagg. Eccl. R. 744; 1 Com. R. 190; Gibs. Cod. 1007.

(j) *Dearle v. Southwell*, 2 Lee, 119.

(k) *Greg v. Greg*, 2 Addams, 284.

fore a cause had been set down in the prerogative court for sentence on the second assignation it is not competent to either party to interpose an \*appeal; whatever is done after the cause is [ \*558 ] concluded and comes on for hearing until final judgment is pronounced, is part of the hearing, and to be considered as one continuous act.(l) In a divorce case,(m) after the hearing had commenced, the wife brought in an affidavit offering to prove fresh facts, which the court refused to admit, as she might appeal from the whole decree as a continuous grievance, that was a case of great length, and the argument was not concluded in one and the same term. In a case of such a nature, if an inhibition were granted and served, the court could not proceed, for it would then become a contempt in the judges to continue the hearing; but if a mere appeal were permitted to be interposed in such a stage, and to stop the proceedings, no cause could be effectively concluded. So further time to bring in an allegation was refused as the party aggrieved might appeal from the whole decree if he thought fit.(n)

*Time for Appealing.*—The time for lodging and interposing an appeal according to the civil and canon law(o) is ten days, but the statute(p) allows the party grieved to appeal within fifteen days next after judgment or sentence given. The court of appeal will not entertain a question as to the admissibility of articles upon an appeal entered more than fifteen days after their admission by the inferior court.(q) The time fixed by any existing law or usage for appeals was adopted by the privy council.(r) It seems that the fifteen days must be taken as one exclusive and the other inclusive.(s) Thus where there was a decree for costs on the 8th April, and the appeal was not entered till the 21st, it was \*considered by the [ \*559 ] court as the last day but one on which it could be entered.(t)

*Stamps.*—The stamps on proceedings in the ecclesiastical courts, imposed by the statute 55 Geo. 3, c. 184, have for the most part been repealed by 5 Geo. 4, c. 41, but a protocol of appeal is a notarial act and still requires a 5s. stamp.(u) It seems that an appeal to the delegates signed but not sealed with a private or official seal is valid.(x)

*Inhibition.*—An inhibition is a writ to forbid a judge from further proceeding in a cause depending before him, being in the nature of a prohibition, and more commonly issues from a superior ecclesiastical court to an inferior upon an appeal.(y) Its object is to stay the exe-

(l) *Barry v. Butlin*, 1 Moore, P. C. 96.

(m) *Raybould v. Raybould*, cited 1 Moore, P. C. 102.

(n) *Anseley v. —*, cited ib.; Oughton, tit. 116.

(o) Ayliffe, Parer. 80; 1 Addams, 108.

(p) 24 Hen. 8, c. 12, s. 7.

(q) *Schultes v. Hodgson*, 1 Addams, 105.

(r) 3 & 4 Will. 4, c. 41, s. 20; ante, p. 549.

(s) *Castle v. Burdett*, 3 T. R. 623; *Lester v. Garland*, 15 Ves. 248; see Reg. Gen. No. 8, Easter T. 1832; see Ayliffe, Parer. 80.

As to the rule of computing days, *Pellew v. Hundred of Wensford*, 9 B. & C. 134; 4 M. & R. 130; *Hardy v. Ryle*, 9 B. & C. 603; 4 M. & R. 295; *Webb v. Fairmanner*, 3 M. & W. 473; 6 Dowl. 549; *Blunt v. Heslop*, 8 Ad. & Ell. 577; 3 Nev. & P. 553; *Rex v. Justices of Shropshire*, 8 Ad. & Ell. 173; *Young v. Higgon*, 4 Jurist, 125.

(t) 3 Hagg. Eccl. R. 481.

(u) *Smyth v. Smyth*, 4 Hagg. Eccl. R. 75.

(x) Ib. 76.

(y) *Terms of the Law, Inhibition*; F. N. B. 39; 2 Burn's Eccl. L. 339.

cution of the sentence in the inferior court until the appeal shall be determined. If an appeal be interposed from grievances or a definitive sentence pronounced or inflicted by an inferior judge in remote parts, an inhibition is first to be requested from the judge to whom it is appealed, (in which inhibition is usually inserted a citation for the party who obtains the sentence,) or at whose petition the grievance was imposed (which party is called the party appellate) to answer in a cause of appeal; and by virtue of this inhibition the judge from whom it is appealed, his register and the party appellate, are to be inhibited that they proceed not further to the execution of the sentence pronounced against the appellant whilst the appeal depends, nor do any thing to his prejudice. And this inhibition is to be certified to the judge to whom it is appealed, with a certificate thereupon, mentioning what day the judge and party were inhibited, and on what day the party appellate was cited to answer in this cause of appeal. And if the party appellate do not appear, he is to be proceeded against in the same manner as in other cases of contumacy.(z) By [ \*560 ] the 96th canon(a) no inhibition can issue \*without the subscription of an advocate; this is required to prevent frivolous suits, and applies to all cases civil and criminal and to appeals as well from a definitive sentence as from a grievance.(b) The signature of the advocate is not sufficient, it must be exhibited, in order that the judge may be informed of the quality of the crime and the nature of the grievance; though in ordinary practice no question is made on granting an inhibition, still the judge must exercise his judgment on the point, and decide whether there is sufficient

(z) Conset, 188.

(a) *Inhibition not to be granted without the Subscription of an Advocate.*—It is ordained and provided that no inhibition shall be granted out of any court belonging to the Archbishop of Canterbury at the instance of any party unless it be subscribed by an advocate practising in the said courts, which the said advocate shall do freely, not taking any fee for the same except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause. The like course shall be used in granting forth an inhibition at the instance of any party by the bishop or chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction, and if in the court or consistory of any bishop there be no advocate at all, then shall the subscription of a proctor practising in the same court be held sufficient. (96 Canon, 2 Phill. R. 437, n.)

*Inhibition not to be granted until Appeal shall be exhibited to the Judge.*—It is further ordered and decreed that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction whatsoever, except under the form aforesaid; and, moreover, that before the going out of any such inhibition, the appeal itself, a copy thereof, (vouched by oath to be just

and true,) be exhibited to the judge, or his lawful surrogate, whereby he may be fully informed both of the quality of the crime and of the cause of the grievance, before granting forth of the said inhibition. And every appellant, or his lawful proctor, shall, before the obtaining of any such inhibition, show and exhibit to the judge, or his surrogate, in writing, a true copy of those acts wherewith he complaineth himself to be aggrieved, and from which he appealeth; or shall take a corporal oath that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the registrar in the country, or his deputy, tendering him his fee. And if any judge or registrar shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified, let him be suspended from the execution of his office for the space of three months. If any proctor, or other person whatsoever by his appointment, shall offend in any of the premises, either by making or sending out any inhibition contrary to the tenor of the said premises, let him be removed from the exercise of his office for the space of a whole year without hope of release or restoring. (97 Canon, 2 Phi. R. 440, 441, n.)

(b) 2 Phill. R. 443, 444.

ground to issue his inhibition.(c) In modern times an inhibition will be issued almost as a matter of course, but still under particular circumstances it is proper for the judge to consider and decide judicially whether he shall decree an inhibition, and may refuse it;(d) at the same time the court interferes with the ordinary course of appeals with great reluctance. The court \*is not legally obliged [ \*561 ] to defer to an appeal till an inhibition is served, nor is there any distinction whether all the acts be done on the day the appeal is asserted or some on a subsequent day; therefore the court, having overruled the objection to the admission of an allegation, on the following court day admitted the allegation, notwithstanding an appeal had in the *interim* been asserted.(e) In appeals from grievances the hands of the court are in no case tied up till the service of the inhibition, and the judge is to exercise a sound legal discretion whether any and what intermediate steps shall be taken. It rests with the court of appeal to determine whether the matter of fact appealed from is or is not in its nature an appealable grievance, and the inferior court is bound to defer to an appeal so far as the mere assigning of a term to prosecute can be construed a deference to it.(f)

A suit for divorce for cruelty and adultery, brought by the wife, was appealed from the Consistory Court of London to the Court of Arches, and there dismissed against the husband by agreement in 1828, but the inhibition to the Consistory Court was not relaxed. In 1831 another suit for the same purpose was brought by the wife against the husband in the Consistory Court, and the judge allowed the libel to be brought in, and overruled the husband's protest, but refused to order him to appear, on the ground that the inhibition in the former suit was in force. An appeal by the wife against this decree having been dismissed for irregularity and the cause remitted, the judge of the Consistory Court refused to receive additional articles to the libel; the Arches Court on appeal admitted them, holding that the agreement putting an end to the former suit was tantamount to a formal relaxation of the inhibition. It was held by the judicial committee that the Arches Court ought not to have admitted the additional articles before the husband had appeared to the suit, but they retained the cause, ordered the husband to appear absolutely to it, and declared that on his appearance they would assign to hear on the original and additional libel and exhibits.(g)

\*On an appeal from pronouncing a party contumacious, [ \*562 ] the judge *a quo* is not justified in proceeding to certify the contempt, but the superior court cannot interpose till the inhibition is returned, having nothing before it upon which to act.(h)

*Attemptats.*—An *attemptat*, in the language of the civil and canon laws, is any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo* pending an appeal.(i) Steps taken by the

(c) *Ibid.*

(d) *Herbert v. Herbert*, 2 Phill. R. 430; 2 Hagg. Cons. R. 264.

(e) *Middleton v. Middleton*, 2 Hagg. Eccl. R. 24.

(f) *Chichester v. Donegal*, 1 Addams, 21.

(g) *Smyth v. Smyth*, 3 Knapp, P. C. 48; 4 Hagg. Eccl. R. 72. 509.

(h) *Hamerton v. Hamerton*, 1 Hagg. Eccl. R. 24.

(i) 1 Addams, 22, n.; Ayliffe, Parer. 100.



judge *a quo* on the same court day, but after an appeal had been entered, and subsequent thereto but prior to the service of the inhibition, and subsequent to even the service of the inhibition, the defendant not being *founded* in his first appeal, were held not to be *attentats*.(k) It is said by Conset, that if the party appealing will proceed in the attempts, he is not compelled to prosecute or proceed in his cause of appeal until the attempts be first discussed and retracted; at least that ought to be first requested, lest he seem to recede from them; yet the said party appealing ought to take care that his appeal be not deferred whilst he is prosecuting his cause of attempts; which inconvenience he may easily remedy, having liberty to proceed in both together.(l) It seems that the regular course for revoking *attentats* is by a separate civil or criminal proceeding against the judge *a quo*, and not by charging them accumulatively in a libel of appeal.(m)

*Of the effect of an Appeal.*—If an appeal be lawfully made the inferior judge cannot proceed, for his authority is suspended.(n) So by an appeal the sentence is suspended.(o) The legal effect of an appeal is mere *suspension*, and not the annihilation of the sentence appealed from. This is evident from these considerations: the sentence appealed from, if affirmed, that is, if it stands at all, stands as the sentence of the court appealed from, not the appellate court—the cause is remitted to the court below; it is by the authority of that [ \*563 ] court that the execution of the sentence is to be enforced; \*and it remains valid from the day upon which it was pronounced by the court appealed from, and not from that upon which it was merely affirmed by the appellate court. In a word, the sentence on appeal, is dormant only, not extinct—and revives, on affirmance, with every consequence attached to it, which would have attached had no appeal been interposed.(p) Hence the stat. 3 Geo. 4, c. 75,(q) which passed *after* a sentence of the Consistory Court of London, pronouncing a marriage null and void by reason of minority and want of consent, under the 26 Geo. 2, c. 33, s. 11, (*though pending an appeal from that sentence*), was held in no degree to affect the marriage in question in that suit.(r) A court of appeal, on an appeal from a grievance, cannot enforce payment of costs incurred in the court below.(s) An appeal suspends the sentence, but the suit still continues.(t) And when the court of appeal affirms the sentence of the inferior court, and remits a cause, the cause stands on the same footing in the court below as it would have done if there had been no appeal.(u) And the court of appeal must endeavour to put parties in the situation they would have been if the court below had done right.(v) In the case of an appeal from a grievance, the parties may

(k) *Chichester v. Donegal*, 1 Addams, 22, 23.

(l) Conset, 207–209.

(m) 1 Addams, 24.

(n) 4 Inst. 340; *Packman's case*, 6 Co. Rep. 18 b.

(o) 1 Roll. 233, l. 40.

(p) Per Sir J. Nicholl, *Blyth v. Blyth*, 1 Addams, 316. See Ayliffe, Parer. 71. The matter is thus summed up, "that an appeal

extinguishes the sentence *quoad præsentem causæ statum*—but that *quoad futurum statum et litis exitum*, it only suspends it; Gail. Prac. Oba. 41; Oba. 144, ii. 1.

(q) See ante, 294.

(r) *Blyth v. Blyth*, 1 Addams, 312.

(s) *Brisco v. Brisco*, 3 Phill. R. 36.

(t) 1 Phill. 208.

(u) 1 Lea, 639; 4 Hagg. 511. 515.

(v) 2 Phill. R. 400.

be put on the terms of arrangement for the future trial of the cause. Thus in *Stephens v. Webb*(x) an appeal was pronounced for on an understanding that the cause should be retained, and the adverse proctor should declare in acts of court that he admitted certain points.

*When new facts are admissible on Appeal.*—In an appeal from a definitive sentence, it is lawful both for the party appealing and the party appellate to allege things not alleged before the judge from whom it is appealed; and to prove things not proved, so as the publication of the witnesses produced in the first instance hinder not. But it is otherwise in an appeal from grievances, which ought to be proved by the proceedings \*and the act of the judge from whom [ \*564 ] it is appealed; unless the grievances upon which it is appealed are omitted, and left out of those proceedings so transmitted, or that the judge from whom it is appealed, or his registrar, hath refused to enter these grievances into the acts which the party appealing supposes himself grieved upon.(y) It has been laid down as a rule on this subject, that though the court, even in an appeal from a definitive sentence, may admit an allegation, yet that it ought to be cautious, and not allow any thing to be pleaded which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined in the court below, and therefore on an appeal from a definitive sentence, the court rejected an allegation pleading facts not shown to be *novita ad notitiam perventa*.(z) On appeals from definitive sentences, matter which could have been pleaded in the court below, and which directly contradicts the plea on which witnesses have been examined in that court, is not admissible, but matter more generally responsive may with caution be received, especially where the cause has not been properly conducted in the court below.(a) In the case of grievances, the cause of appeal should appear on the face of the inhibition.(b) An appeal upon a grievance must be heard from the acts of the court below. The process and the registrar's return are the proper evidence of what had been exhibited; and therefore the court rejected the affidavit of a party to bring in papers which were not in the cause below, and to contradict the judge and the registrar's return.(c) We have already seen that the judicial committee may admit new evidence upon the hearing, without reference to the distinction between appeals from definitive sentences and grievances.(d)

In an appeal from refusing the prayer of a petition, the appellant, who originally prayed to be heard on his petition, begins.(e)

\*We have already seen that in appeals from grievances, the court of appeal cannot give costs incurred in [ \*565 ] the court below.(f) In appeals to the judicial committee, the costs are in the discretion of that court.(g)

(x) 1 Lee, 262.

(y) Conset. part 5, c. 1, s. 5, pl. 3, p. 216.

(z) Oughton, tit. 303, s. 1; Conset, 216; *Fletcher v. Le Breton*, 3 Hagg. Eccl. R. 365.

(e) *Pries v. Clark*, 3 Hagg. Eccl. R. 265. See 2 Phill. R. 394. 400. 583.

(b) 97 Canon, ante, p. 559.

(c) *Fenshaw v. Verdon*, 1 Lee, 625.

(d) 3 & 4 Will. 4, c. 41, s. 8, ante, p. 547.

(e) *Hughes v. Turner*, 4 Hagg. Eccl. R.

47, n.

(f) Ante, p. 563. See 2 Hagg. Eccl. R. Suppl. 133.

(g) 3 & 4 Will. 4, c. 41, s. 15, ante, p. 549.

## SECT. V.—OF SUITS OF NULLITY OF MARRIAGE.

*Object of these Suits.*—Suits of nullity or suits instituted for the purpose of having marriages declared null and void are of two kinds: first, when the marriage is ipso facto null and void, and no declaratory sentence is absolutely necessary; but when it is expedient to procure a sentence to prevent the consequences which might in future take place from the death of witnesses, or other occurrences rendering proof of the invalidity of the marriage difficult or impossible. Under this head are comprised suits for declaring a second marriage null and void, when at the time of such second marriage one of the parties had been previously legally married, and the marriage not dissolved by death or the operation of law; suits for the purpose of having a marriage de facto declared null and void by reason of legal invalidity arising from a noncompliance with the marriage acts, or from force, or in very rare instances, where there is an extraordinary combination of circumstances proved in effect equivalent to force.(a) Where the marriage act declares marriages to be void, the sentence of the ecclesiastical court is declaratory only, it does not make them void.(b) But though no such sentence is necessary, it is a matter of convenience to the parties that it should be given, and it is a duty which the court owes to the public to declare the situation of the parties.(c)

The second description of suits of nullity is in cases where the marriages are voidable.(d) A sentence of nullity as we have already seen, may be obtained on account of impotence or sterility in either [ \*566 ] sex, when it can be proved to have existed \*at the time of the marriage,(e) or on account of the marriage being within the prohibited degrees.(f) In the case of voidable marriages, if the sentence of a proper ecclesiastical court be not obtained during the lifetime of *both* the parties, it cannot, after the death of either, be questioned in any court whatsoever.(g) In the case of a sentence in a matrimonial suit, on a voidable marriage, it does not appear that after the parties are dead the question can be agitated again by the children.(h)

In suits of nullity the court is bound to act with peculiar caution, lest the legitimacy of children may improperly be brought into question.(i) It is competent to a party to set up the nullity of a first marriage in bar of a sentence praying the nullity of a second marriage by reason of the first, although the party has previously been convicted and sentenced to transportation for bigamy in respect of such two marriages.(k)

*By whom suit may be Instituted.*—Either of the parties to a marriage may institute a suit for having it declared void, on the ground

(a) Rep. Eccl. Comm. 43.

(b) 1 Hagg. Cons. R. 214.

(c) *Hayes v. Watts*, 3 Phill. R. 44.

(d) See ante, p. 483.

(e) Ante, p. 201—213.

(f) Ante, p. 179.

(g) Rep. Eccl. Comm. 43; ante, pp. 483—

485.

(h) 1 Hagg. Eccl. R. 655.

(i) *Wright v. Ellwood*, 2 Hagg. Eccl. R. 600. See 1 Hagg. Cons. R. 263.(k) *Bruce v. Burke*, 2 Addams, 471; ante, p. 231.

that it is material to their interests and that of the public that their *status* should be known, and that it should be defined by the sentence of a competent court.(l) The interest of the public has been considered greater in cases of marriages absolutely void, than in those merely voidable.(m) A sentence of nullity is not discretionary on the part of the court. Every person interested, who thinks there is a legal defect in a marriage, may apply and has a right to a declaratory sentence, if his application is well founded. It may be necessary for the convenience and happiness of families and of the public likewise that the real character of these domestic connections should be ascertained and known.(n) We have already seen that either of the parties to a marriage \*within the prohibited degrees, and [ \*567 ] that parties having a pecuniary interest depending upon the validity of such a marriage, may institute suits of nullity.(o) In suits for nullity of marriage the committee may proceed for dissolution of the marriage on account of the alleged incapacity of the lunatic at the time it was celebrated.(p)

Every parent is deeply interested in the welfare of his children as affected by matrimonial connections, and has a right to question a matrimonial contract entered into during the minority of his child;(q) not on the ground of any pecuniary, but of a moral interest, which he has in the welfare of his child.(r) So a guardian may institute a suit of this kind in respect of his ward, without reference to any pecuniary interest.(s) On a petition on the part of the wife, stating that the suit had been commenced by the father, as guardian of the minor, who was then of age, and praying that he might then be cited to appear and carry on the suit in his own name, with intimation that the court would otherwise dismiss the wife, it was held that the father might go on with a suit clearly instituted during the son's minority, after the minor came of age; and if the minor should appear in the cause, it would not abate the suit.(t) So the consent of a minor, not being necessary for suits of nullity, a testamentary guardian may proceed after the minor has attained his majority.(u) It does not appear to have been determined that the father or guardian can commence a suit after the minor has come of age; but Lord Stowell would not say that he might not, as in case of the son's death, or other particular circumstances, it might be convenient that he should have such right.(x) Where the court finds a guardian apparently appointed with sufficient regularity, in absence of proof of the invalidity of the appointment, it will be presumed that the party was properly qualified to receive it.(y) Where a minor had been excommunicated, to \*compel a lawful appearance in a suit for nullity of [ \*568 ] marriage, a person having appeared ready to take the guardianship, the court *ex officio* appointed him, with the consent of

(l) 1 Curteis, 226, 227.

(m) 3 Phill. 161.

(n) *Pertreus v. Tondear*, 1 Hagg. Cons. R. 137, 138.

(o) Ante, p. 179.

(p) *Parnell v. Parnell*, 2 Phill. R. 160; ante, p. 200.

(q) 1 Hagg. Cons. R. 327.

(r) 1 Curteis, 227.

(s) Ibid.

(t) *Bowzer v. Ricketts*, 1 Hagg. Cons. R. 213.(u) *Lord Courtenay's case*, Cons. 1762; Deleg. 1763; 1 Hagg. Cons. R. 215.(x) 1 Hagg. Cons. R. 215. But see *Balfour v. Carpenter*, 1 Phill. R. 222.(y) *Berham v. Berham*, 1 Hagg. Cons. R. 5, 6; ante, 396.

the proctor, who had been appointed by the minor.(z) But after a child has attained the age of twenty-one years, the father, merely in that capacity, has no special privilege to institute a suit respecting a child's marriage, but must show a specific interest as well as any other person,(a) although the child continues to reside with the father as part of his family.(b) But the liability of a father to support the issue of his child constitutes such an interest in the legitimacy or illegitimacy of such children as will entitle him to maintain a suit in the ecclesiastical courts for annulling the marriage of the child, the grandfather being bound by the positive law of the country,(c) and still more by the law of nature, to provide for his grandchildren, notwithstanding their majority.(d)

It does not appear to have been determined that the next of kin of a person, *qua* next of kin, with a *spes successionis*, has been considered to possess a sufficient interest to institute a proceeding of this kind.(e) In *Faremouth v. Watson*,(f) it was said that a slight interest was sufficient to enable a party to bring a suit for setting aside a marriage on the ground of affinity; and the sisters of a man who were his next of kin, and had an interest under a will contingent upon the death of their brother without lawful issue, were held competent to sustain a suit for setting aside a marriage of their brother with [ \*569 ] the sister of his deceased wife.(g) The situation \*of a person who, instead of receiving a benefit on the failure of issue, was bound by the will or settlement to pay a sum of money in the event of the existence of issue of the marriage, must, it should seem, have a similar legal interest to sue for the dissolution of the marriage.(h) There is however a material distinction between *voidable* marriages which can only be questioned during the lives of both parties,(i) and *void* marriages which may be called in question at any time.(j) A stranger has no interest in the marriage of others except as one of the public, and as such can only institute a criminal proceeding, which is *ad publicam vindictam*. A stranger wishing to proceed in a civil suit must show a special pecuniary interest.(k)

*Of the Right of Intervention of a Third Party.*—In the ecclesiastical courts a *third person*, not originally a party to the suit or pro-

(z) *Turner v. Felton*, 2 Phill. R. 93.

(a) *Turner v. Meyers*, 1 Hagg. Cons. R. 414, n.; *Balfour v. Carpenter*, 1 Phill. R. 221. See ante, p. 200; 3 Rep. 38 b; *Barham v. Dennis*, Cro. Eliz. 770.

(b) *Ray v. Sherwood*, 1 Curteis, 173; 1 Moore, P. C. 397.

(c) Stat. 43 Eliz. c. 2; 1 Bl. Comm. 448. See 4 & 5 Will. 4, c. 76, s. 78. See *Rex v. Inhabitants of New Forest*, 5 T. R. 478; *Rex v. Sowerby*, 2 East, 276; *Rex v. Inhabitants of Roach*, 5 T. R. 252; *Rex v. Everton*, 1 East, 526; *Rex v. Bleasby*, 3 B. & Ald. 377; *Rex v. Wilmington*, 5 B. & Ald. 525; *Rex v. Lawford*, 8 B. & C. 271.

(d) *Ray v. Sherwood*, 1 Curteis, 230; *Sherwood v. Ray*, 1 Moore, P. C. 353.

(e) 1 Curteis, p. 225.

(f) A plaintiff in a bill to perpetuate testimony must have a present interest, but the

next of kin of a lunatic who is in a most hopeless condition both of body and mind, have not such an interest as will qualify them to maintain such a suit.—6 Ves. 269; 15 Ves. 133; 2 Jac. & W. 451; Mitf. Pl. 51—53, 4th ed.

(g) 1 Phill. R. 335; see 2 Addams, 336. The admission of the allegation was opposed, and the judge took time to deliberate whether the parties promoting the suit had not set forth sufficient interest to authorise the court to entertain the question.

(h) *Sherwood v. Ray*, 1 Moore, P. C. 400; see 1 Addams, 16.

(i) Ante, p. 484; see 1 Moore, P. C. 400.

(j) See 1 Hagg. Cons. R. 415, n.; 1 Addams, 27.

(k) *Ray v. Sherwood*, 1 Curteis, 226; 1 Hagg. Cons. R. 415, n.

ceeding, but claiming an interest in the subject-matter, may interpose in defence of his own interest in every case in which it is affected either in regard of his property or person. This proceeding is termed an *intervention*, and is unknown in our courts of law and equity. Parties may intervene in causes of *matrimony*, of ecclesiastical benefices and of testaments.<sup>(l)</sup> A party who has no interest cannot be permitted to intervene in a cause on the ground that a guardian was colluding with an adverse party.<sup>(m)</sup> If a man takes out proceedings against a woman in a cause matrimonial, and the woman has either solemnized or contracted marriage with another man, such other man or third party may if he pleases interpose in the said suit, to protect his own rights, in any part of the proceedings, even after the conclusion. \*It matters not whether he appears in aid of [ \*570 ] the party convened or cited to appear, or in opposition to the woman, or the party convened or cited acting in collusion with the plaintiff. Neither is the case altered by any previous notice he might have of the pending suit, and of the plaintiff's having proceeded to proof. The reason is, that the court favours and protects matrimony, for in such cases the welfare of the immortal soul is involved. Consequently the publication of witnesses and the conclusion in the cause, do not prevent the interposition of a third party, alleging a prior contract and a previous marriage. He must however declare on his oath, that he does not interfere with any malicious intent, or for the purpose of protracting the litigation, and that he believes that he can make good his declarations. In such case he may be admitted to tender his allegation, and to prove his interest, notwithstanding the publication of the witnesses and the conclusion of the cause. But in matrimonial causes, the party intervening ought, and is bound, to take up the cause in that stage in which he found it when he interposed, and he must not delay the suit. The plaintiff may proceed against the defendant as if the third party had not intervened.<sup>(n)</sup>

In a suit for restitution of conjugal rights, brought by the first wife against the husband, the lady of the second marriage was not made a party to the suit, but Lord Stowell said she might have been a formal party if she had chosen to *intervene*, although in substance she was a party, as her marriage was pleaded and proved, and as much under the protection of the court as if she had been a formal party respecting the validity of the other marriage. Afterwards, on an appeal to the Court of Arches, an allegation was asserted on behalf of the lady of the second marriage, and time prayed, which was refused by the judge of the Court of Arches. But the Court of Delegates, on appeal, allowed time, and her allegation was given in, although it was ultimately rejected.<sup>(o)</sup>

(l) Oughton, tit. 14; 3 Phill. R. 586; 4 Hagg. Eccl. R. 67.

(m) *Bratherton v. Hellier*, 1 Lee's R. 599. Gail observes, in his very valuable observations on this subject, "the advocate on the adverse side should diligently examine into and ascertain the interest of the third party intervening, whether or not it relates to the principal matter in dispute."—Gail, lib. i. obs. 19. A third party may further institute a

cause of appeal, independent of the principal party not appealing or not prosecuting the appeal.—*Ibid.* obs. 20, 21. See as to intervention, *Schoolmasters of Scotland v. Fraser*, 2 Hagg. Eccl. R. 613, 292; *Wood v. Medley*, 1 Hagg. Eccl. R. 645.

(n) Law's Forms of Eccl. Law, 70, 72.

(o) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 53, 137, n. See 2 Bligh N. S. 343.

Although the practice of the ecclesiastical court allows any parties interested (not parties to the suit) to intervene in any stage of the suit, [ \*571 ] it seems doubtful whether the house of \*lords will allow parties to intervene originally on an appeal from the court of session, and whether the cause must not be remitted for that purpose.(p)

No party can of right plead in a principal cause after publication has once passed of evidence already taken. Interveners must take the cause in which they intervene as they find it at the time of their intervention. Hence they can only of right do what they might have done had they been parties in the first instance, or had their intervention occurred in an earlier stage of the cause. But the court, if prayed, may still, *ex gratia*, permit a party so to plead on cause shown. Where facts set forth in an affidavit, in order to found a prayer to that effect, on the part of an intervener, were insufficient to sustain the prayer, the party so praying was permitted under the circumstances to cross-examine the witnesses on the other side, on first giving security for the payment of costs, if finally awarded against him by the court.(q)

*Decree to see Proceedings.*—After a libel had been given in a suit of nullity between husband and wife, a decree to see proceedings in the cause, with the usual intimation, was taken out by the wife against the presumptive heirs in succession to the plaintiff's honours and estates in the event of the marriage sought to be impugned in the suit being pronounced void; the object of which was, that the wife might establish the important fact of her marriage not only against her husband but against the other parties so cited. A protest was made against such decree, on the ground that no instance had occurred of the issue of a similar process in a suit of nullity of marriage, where the alleged ground of nullity was a breach of the marriage act: that as no remainder-man can institute that species of suit for his own benefit, so neither is he compellable to become a party to it for that of any body else, that the party cited had no direct immediate interest in the point at issue in the cause; and that neither the proceedings had nor the sentence pronounced in it would be legally binding on him. Lord Stowell however decided nothing as to the liability of the party

[ \*572 ] to be called upon under such circumstances \*to see proceedings;(r) and Sir J. Nicholl, on appeal, abstained from intimating any opinion upon that point, but observed that the judge, in issuing the decree to see proceedings, appeared to have considered that it could at least lead to no injustice to give parties so deeply interested as those in remainder notice of the proceedings, and to afford them an opportunity of intervening if they thought it for their interest, leaving it for them to choose whether they would appear or not.(s) A decree to see proceedings is not a compulsory process menacing the parties cited with any penalty in case of non-appearance; it merely invites them to become parties to the suit, if they deem it their interest to do so, with intimation that otherwise the suit

(p) *Macneill v. Macgregor*, 2 Bligh, N. S. 293. 447.

(q) *Clement v. Rhodes*, 3 Addams's R. 37,

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(r) *Donegal v. Donegal*, 3 Phill. R. 586.

(s) *Chichester v. Donegal*, 1 Add. R. 16.

S. v. *Earl of Belfast v. Chichester*, 2 Jac. & W. 439.

will proceed in their absence; it leaves them at liberty to appear or not to appear at their pleasure.(t)

*Proof of Marriage.*—In ordinary cases, where the plaintiff and defendant are the alleged contracting parties, and a sentence declaratory of the nullity of an alleged marriage is prayed, the court will not pronounce such a sentence without proof of the marriage sought to be annulled. If the plaintiff fails in producing such proof, it is the duty of the court to withhold its declaratory sentence of nullity, how clearly soever all the several facts may be established in evidence, upon which, had the marriage itself been established by similar evidence, a sentence declaratory of its nullity might well have been founded.(v) Cases have occurred in which an ecclesiastical court has proceeded to a sentence of nullity without full proof of the marriage declared null by its sentence, on the ground that the requiring strict proof of the marriage from the complainant would have defeated the suit. In three cases,(w) the court in which the suit was depending pronounced a marriage therein pleaded to have been void, if *any such were had*; plainly in the absence, as appeared by the sentence itself, of *full*, at least, *proof* of the marriage. But in none of those suits were the plaintiff and defendant the alleged contracting parties, for the marriage sought to be impeached in every one of [ \*573 ] them was not only a marriage to which the party complainant was *personally* not privy, but it was a marriage the particulars of which, in all probability, were studiously concealed from the party complainant by the defendant; and that expressly in order to defeat the object of the suit, namely, a sentence annulling that marriage. Consequently it would have amounted at once in effect to a defeazance of the suit, to have required strict proof of the marriage sought to be annulled from the complainant in any one of those cases.(x)

*Identity of Parties.*—In all cases where a dissolution of the marriage is the object of the suit, it is the especial duty of the court to guard against imposition; where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion, and should only be brought into question upon the most undisputed proofs. In a suit instituted to annul a marriage, on the ground of a former marriage, alleged to have taken place between a woman and a man who was living at the time of the latter marriage, the identity of the parties must be satisfactorily proved.(y)

*Evidence.*—In a cause of nullity of marriage promoted by the father of a minor, the evidence of the wife of such father is admissible, for he was not a party suing in his own right, but merely a formal party, to make a lawful appearance for his daughter.(z) An objection was taken to the competency of the father to be a witness, who had originally instituted proceedings (to annul the marriage of his son), which were continued by the son on his coming of age, but the objec-

(t) *Ibid.* 10, 11.

(v) *Nokes v. Milward*, 2 Addams R. 326.

(w) *Heseltine v. Murray*, *Fust v. Bowerman*, *Watson v. Faremouth*, cited 2 Addams R. 399.

(x) *Nokes v. Milward*, 2 Addams R. 399,

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400.

(y) *Searle v. Price*, 2 Hagg. Cons. R. 187; ante, p. 414.

(z) *Buckeridge v. Buckeridge*, 2 Phil. R. 131.



tion was overruled, because the son's intervention in the suit was a supercession of the father, and by taking up the suit where he found it the son had adopted and sanctioned all which had been done. For the sake of greater regularity, however, the conclusion of the cause was rescinded, to enable the father formally to withdraw himself from the suit, and then with his wife to be repeated to their depositions.(a)

[ \*574 ] \*SECT. IV.—OF SUITS FOR THE RESTITUTION OF CONJUGAL RIGHTS.

*Object of Suit.*—The suit for *restitution of conjugal rights* is brought in the ecclesiastical courts whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the other may by suit in the ecclesiastical court compel the party withdrawing to return to cohabitation, if either party be weak enough to desire it, contrary to the inclination of the other.(a) In this suit the marriage is pleaded by the party proceeding, and it is further alleged that the party proceeded against has withdrawn from cohabitation, and the prayer is that the defendant, whether husband or wife, shall be compelled to return to cohabitation. In defence, the marriage may be denied, or the adultery or cruelty of the plaintiff pleaded in bar. This process has in a very few instances been resorted to for purposes resembling those sought to be attained by the Scotch proceeding of *declarator of marriage*, namely, with the view of trying the validity of a marriage, respecting the legality of which some doubt may exist, and where there may be a chance that the witnesses to establish the same may, if the marriage be contested at a future time, be dead or not forthcoming.(b)

*When the court will interfere.*—The ecclesiastical court can only interfere in the way of restitution of conjugal rights where matrimonial cohabitation is suspended. Hence it is not competent for the wife to institute such a suit on the ground that she is not treated by the husband with conjugal affection, for matrimonial intercourse may be broken off on consideration of health and other causes, with which it is quite incompetent for the court to interfere.(c)

If a man has solemnized matrimony with one, and afterwards marries another, if the lawful wife desires to be restored to her husband, she may institute a suit in a cause of divorce from the tie of the second marriage, and of restitution of conjugal rights. And this suit should be [ \*575 ] instituted against the \*man and second woman that he married, for sentence of divorce is not valid against her, unless she be cited. And what is said of the man will hold of the woman. Or if the woman in the second marriage has a mind to have that marriage declared null, she may sue in a cause of divorce from the tie of marriage; and for the reason above mentioned, she here should institute the action against the lawful wife.(d)

(a) *Sumerfield v. Mackintire*, 1 Hagg. Cons. R. 419, n.

(a) 3 Bl. Comm. 94; 1 Addams, 305; 3 Hagg. Eccl. R. 619.

(b) Rep. Eccl. Comm. 43.

(c) *Orme v. Orme*, 2 Addams, 382.

(d) Cockburn, 109, pl. 5, 6, 7.

In a case where there had been neither consummation nor cohabitation of the parties since the marriage was solemnized, the validity of which was questioned, Sir H. Jenner said, assuming the alleged marriage to be valid, the husband would have a right to claim the *consortium* of his wife, and if she refused to cohabit with him, he would be entitled to institute a suit in the ecclesiastical courts, not for the purpose of compelling her to return to cohabitation in his house, (for into his house she had never entered as his wife,) but to afford him the *consortium vite*, which she had withheld from him by his own consent from the day of the marriage down to that time.(e)

*What Questions are involved in these Suits.*—Suits for the restitution of conjugal rights involve all the questions which can arise not only upon the legality of the marriage but also upon the collateral question whether the husband or the wife has by adultery or cruelty, or infamous conduct, forfeited the matrimonial rights, and the ultimate decree will depend on these circumstances.(f) By the practice of the ecclesiastical courts a matrimonial suit frequently changes its original object, and this even on a collateral ground. Thus in a suit against a woman for jactitation of marriage, if she plead that she and the complainant were duly married, and she establish the fact, the sentence will be restitution of conjugal rights.(g) And in a suit by a wife for restitution of conjugal rights, if the husband in defence or excuse allege the adultery of the wife, he may in that very suit pray and proceed for a divorce on the latter ground.(h) A suit for restitution of conjugal rights may assume the shape of a suit of nullity of marriage, \*as where it was asserted in the plea that [ \*576 ] the alleged marriage was not conformable to the *lex loci*.(i)

*Mode of Proceeding.*—In a suit for restitution of conjugal rights, a citation issues under the seal of the ecclesiastical court, claiming jurisdiction, or a decree (by letters of request) from the Arches Court, at the suit of the plaintiff, calling upon the defendant to render conjugal rights. Upon a personal service having been effected, and the citation returned, and an appearance given, a libel is brought into court, pleading that the parties being free from matrimonial engagements, A. B. paid his court in the way of marriage to C. D. the marriage, when, where, and the entry thereof in the register book of the parish wherein they were married, a copy of which entry is annexed to the libel, the living and cohabiting together, and passing as man and wife, and birth of children (if any;) the ceasing and refusal of one of the parties to cohabit, and the jurisdiction of the court; and concludes by praying that the marriage may be pronounced for, and the party offending render conjugal rights. The defendant as a bar may, by responsive allegation, plead cruelty or adultery, (if the facts are so,) and if either be established, the suit may, as we have seen, terminate in a decree of divorce.(k) But if no such answer be advanced, then, after the libel has been admitted, the defendant is required to give an answer thereto; should it be in the affirmative, the party offending is

(e) *Ray v. Sherwood*, 1 Cartois, 198. See *Nokes v. Milward*, 2 Addams, 398.

(f) 1 Chitty's Pr. 789.

(g) *Hawke v. Corri*, 2 Hagg. C. R. 285, 6.

(h) *Lambert v. Lambert*, 1 Cartois, 6; Chitty's Pr. 462.

(i) *Swift v. Swift*, 4 Hagg. Eccl. R. 153.

(k) *Ante*, p. 574.

admonished and directed by the judge to render conjugal rights; should the answer however be in the negative, witnesses are examined, and upon publication of the evidence, and no allegation excepting to the testimony of any of them be given, the judge hears the cause and passes sentence; and presuming such sentence to be favourable to the complaining party, he directs the defendant to render conjugal rights, and decrees a monition to issue to that effect; and if the defendant, after personal service of such monition, treat the order of the court with contempt or neglect to conform, the judge, upon notice having been given to the defendant, will pronounce him contumacious, and direct \*such contempt to be signified; upon [ \*577 ] which a writ *de contumace capiendo* for taking the defendant into custody issues from the court of chancery.(l)

*Facts pleadable in Bar.*—The facts pleadable in bar to a suit for restitution of conjugal rights, are such only as upon proof will entitle the party who pleads them to a sentence of *separation*, such sentence being prayed. No facts are sufficient to bar the proceeding, except such as would have been sufficient ground for a divorce in an original suit.(m) The only lawful cause for withdrawing from cohabitation is the cruelty or adultery of the other party, for the court can take no cognizance of disputes about property or mutual agreements to live separate.(n) Adultery may be pleaded by the defendant in a suit for restitution of conjugal rights, and if proved, may be the foundation of a sentence of divorce.(o) In a suit for restitution of conjugal rights, brought by the wife, a separation was decreed where the husband pleaded her adultery, proved gross impropriety of conduct, absence from home (unaccounted for) on two nights, letters from her containing admissions of guilt, and endeavours to induce individuals to give false representations where she slept.(p) Though in a suit for separation on account of the wife's adultery, the wife will be entitled to her dismissal on the ground of the husband's connivance at her incest, with his brother, it does not necessarily follow that in a suit for restitution of conjugal rights the court will compel the husband to return to an incestuous bed.(q) It seems that the wife's incontinence in her single state may be pleaded by the husband in answer to the wife's libel in a suit for restitution of conjugal rights.(r)

A suit for restitution of conjugal rights may be met by a plea of cruelty, or by a plea of adultery and cruelty set up on the part of the wife, with a prayer for separation, and when clearly proved, is a [ \*578 ] sufficient bar to the suit, and will entitle \*the wife to a sentence of separation:(s) for the court will not enforce the discharge of conjugal duties where the wife's personal safety is endangered;(t) where she is exposed to a repetition of acts of personal injury on account of the passions of the husband being so much out of his own control that it is inconsistent with her personal safety to continue in his society.(u) The husband may give in a respon-

(l) 2 Chitty's Pr. L. 487.

(m) *Holmes v. Holmes*, 2 Lee, 116.

(n) *Barlee v. Barlee*, 1 Addams, 305.

(o) *Best v. Best*, 1 Addams, 411.

(p) *Owen v. Owen*, 4 Hagg. Eccl. R. 261.

(q) *Denniss v. Denniss*, 3 Hagg. Eccl. R.

353, n., 348, n.

(r) *Perrin v. Perrin*, 1 Addams, 4.

(s) 1 Hagg. Cons. R. 361; 2 Hagg. Eccl. R. Suppl. 65; 3 Ib. 618.

(t) Ib. 458.

(u) 2 Hagg. Eccl. R. Suppl. 129.

sive allegation, setting up condonation, and the wife a second allegation, explanatory of matters contained in the responsive allegation. (w) The parties shortly after marriage separated, and a few months after the wife instituted a suit for restitution of conjugal rights, and the husband was assigned to take her back and treat her with conjugal affection, and he submitted to the decree of the court. The wife subsequently instituted a suit for a separation by reason of cruelty. A suit for restitution of conjugal rights strongly infers that at the time of instituting such suit the party had no reasonable ground to apprehend personal violence; but it does not amount to an absolute bar to a sentence of separation for antecedent cruelty, *a fortiori* it would not exclude the wife from pleading acts of harshness and severity previous to such suit in conjunction with acts of cruelty subsequently. (x)

If a wife, proceeding against her husband for cruelty and adultery, was not originally justified in withdrawing from cohabitation, the court must pronounce her under the obligation to return. (y) In answer to a suit for restitution of conjugal rights brought by the husband, legal cruelty, being established, but a reconciliation and matrimonial intercourse having afterwards taken place, the court enjoined the wife to return to cohabitation, holding that there was no proof of subsequent misconduct by the husband, sufficiently removing the bar of condonation and reviving the previous cruelty, to entitle the wife to a sentence of separation. (z) Where the wife is acting [ \*579 ] *on the defensive* in this suit, pleading cruelty and adultery, she is not relieved from the proof of the necessary facts; yet under such circumstances the inference arising from facts, when established, may be stronger than where she is the original complainant; thus, where a suit for the restitution of conjugal rights is promoted by the husband, the wife is not, according to the practice and doctrine of the ecclesiastical courts, held precisely to the same strictness of proof of cruelty or adultery as is necessary where the party making such charges is the original complainant. (a) An allegation responsive to the libel of the husband in a suit for the restitution of conjugal rights was admitted to proof although the facts pleaded amounted to a charge of neither cruelty nor adultery against the husband. The principal facts were that the husband's permanent domicile was in Ireland, and that the wife being in England was incapable of removing to Ireland, or undertaking any considerable journey, without imminent danger to her health. The court however could not pledge itself to the effect of the facts pleaded as a bar, either wholly or in part, to the sentence prayed, on behalf of the husband, in the libel, at the final hearing of the cause. (b)

*Suit not barred by Lapse of Time.*—The long discontinuance of cohabitation is not alone a bar to this suit. In *Mordaunt v. Mordaunt*, (c) in a suit for restitution of conjugal rights, in the year 1794,

(w) *Bramwell v. Bramwell*, 3 Hagg. Eccl. Eccl. R. Suppl. 1. R. 618.

(x) *Neeld v. Neeld*, 4 Hagg. Eccl. R. 268.

(y) *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 784; 1 Hagg. Cons. R. 153.

(z) *Westmeath v. Westmeath*, 2 Hagg.

(a) *Bramwell v. Bramwell*, 3 Hagg. Eccl.

R. 619.

(b) *Molony v. Molony*, 2 Addams, 249.

(c) 1st June, 1794, cited 1 Hagg. Cons.

R. 135, n.

the libel pleaded the marriage on the 27th Feb. 1759, the desertion of the husband in April following, that he left Ireland and came to England, where he remained concealed from the wife till he was lately discovered, when being required to receive his wife he refused: on an objection to pleading desertion at such a distance of time, the court said it knew of no limitation of time. There was none imposed by statute, or by any rule which the court had laid down for itself. It was not in its power to refuse relief on that ground, the libel was therefore admitted.

*Deeds of Separation.*—We have already seen that deeds of separation are no bar to a suit for divorce by reason of adultery.<sup>(d)</sup> [ \*580 ] It has not been the practice of the ecclesiastical courts to consider agreements that the husband will not sue for a restitution of conjugal rights as affecting in any way the legal relation of the parties.

Deeds of separation cannot be pleaded in the ecclesiastical courts as a bar to its further proceedings; for that court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices which the parties are not at liberty to desert—an assumption of a false character in both parties, contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and man to live together “till death do them part,” and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes, which the law itself has not pronounced to be sufficient, and sufficiently proved. The ecclesiastical courts have uniformly rejected such covenants as insignificant in a plea in bar, and leave it to other courts to enforce them so far as they may deem proper, upon a more favourable view (if they entertain it) of their consistency with the principles of the matrimonial contract. As a plea in bar the court will reject it, although such a deed as explanatory of the conduct of the parties may be very material.<sup>(e)</sup> In a case in the house of lords, Lord Brougham said, the strongest articles of agreement for separation, drawn up and signed with the full acquiescence of husband and wife, will not prevent them suing each other. It is at most a mere temporary arrangement, a permission to live elsewhere, not affecting legal domicile or any other condition inherent in the relation of husband and wife. One may pledge himself not to claim or institute a suit for conjugal rights, but he cannot be bound by any such pledge, for it is against the inherent condition of the married state as well as against public policy.<sup>(f)</sup> In *Smith v. Smith*,<sup>(g)</sup> in a suit by the husband for restitution of conjugal rights, the [ \*581 ] wife pleaded articles of separation, with a clause that the husband should not proceed in the ecclesiastical court. This plea however was overruled, and Dr. Wynne observed, “that he believed it was the first time the question had come directly before it, and was surprised that it should be brought forward.” In another case, in a

(d) Ante, pp. 417—419.

Finn. 561, 562.

(e) *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 318.

(g) Consistory, 1781, cited 2 Hagg. Eccl. R. 44, n.; *Neak v. Neak*, 1 Hagg. Cons. R. 192.

(f) *Warrender v. Warrender*, 2 Clark &

suit for restitution by the husband, the same point was raised and decided on the authority of the former case. The principle of these decisions has been acted on in subsequent cases.<sup>(h)</sup>

Where a deed of separation recited that the husband, at the particular instance and at the sole desire of the wife, agreed to live separate and apart from her, and to allow such separate maintenance and yearly provision for her and her child as was thereafter mentioned: and then followed the provision and the usual covenants, that she should live apart unmolested, and that she should bring no suit or process to compel her cohabitation. Sir J. Nicholl observed, "as a deed of separation upon mutual agreement on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, these articles would offer no impediment to the husband's present suit (for restitution of conjugal rights,) but as evidence against him, necessarily implying a confession of ill usage subsequent to the condonation, they appear unanswerable, and are a strong acknowledgment that the *casus fœderis* had occurred. On that confession alone, coupled with the character of his temper and former acts, if the case had even rested here—if the parties had never met after the execution of that deed, I should have entertained considerable doubt whether the husband was entitled to the aid of the court to compel his wife to return, whether the court would not at least dismiss the wife. It would be a new case, and at present I give no opinion upon it, as it may be unnecessary to solve it; the full discussion of the point would be inconvenient among the mass of matter which composes the present suit, at all events it is proper first to examine the remainder of this painful history."<sup>(i)</sup> The deed however was not the only evidence of the subsequent ill usage.

*\*Sentence of the Court.*—The sentence of the court [ \*582 ] usually enjoins the husband to receive his wife home in that character, and to treat her with conjugal affection, and to certify to the court that he has done so within a time fixed by the court.<sup>(k)</sup> The consequences of a non-compliance with a decree of the court is excommunication and imprisonment.<sup>(l)</sup> Though it may be thought hard to send a wife back to a husband who has given proof of alienated affections by deserting her, yet the court does not send her back without due care for her reception; for the monition is not only that he shall take her back, but that he shall treat her with conjugal kindness; and though the court cannot interfere in the minute details of family life, for much must be left to the consciences of individuals, yet the court will see its monitions so far obeyed that the great obligation of conjugal duty shall be complied with.<sup>(m)</sup> When a husband, who has been sued successfully for restitution, certifies as usual, in order to his dismissal, that he has taken his wife home and treated her with conjugal affection, the wife may be heard in objection to such certificate, and on proof that, though she has been *taken home*, the husband *at home* has *not* treated her with "conjugal affection,"

(h) *Fletcher v. Fletcher*, Consis. 1786, R. 119.

cited 2 Hagg. Eccl. R. 44.

(i) 3 Hagg. Eccl. R. 635; see ante, p. 342.

(j) *Westmeath v. Westmeath*, 2 Hagg. 495.

Eccl. R. App. 115.

(m) *Evans v. Evans*, 1 Hagg. Cons.

(k) 2 Hagg. Cons. R. 137; 1 Hagg. Cons. 119, 120.

in his own plea, and there was abundant reason to conclude from documents produced that the liberty was not only given but that the complainant clothed her with that character in all places and in all situations—in England and abroad—in London and at his country residences—amongst his tradesmen, his neighbours, and his friends—in his intercourses of private life, and to the representatives of foreign governments, where it was necessary to give her a true description, to entitle her to a privileged reception in the countries they represented. In addition the husband had introduced her to his own children by his deceased lady as succeeding to her rights and duties in the care and management of her unprotected offspring. Such acts were held to deprive him of a right to complain of an injury, which, if it existed [ \*586 ] at all, he had inflicted upon himself, and this not in a moment of indiscretion at once lamented and withdrawn, but publicly and privately, in habit and for years, without intermission, and in situations where very powerful calls of both duty and decorum might have been expected to impose a restraint. For it is difficult to maintain that the defendant was liable to a charge for malice for following his own authorized precedents for adopting the character he had conferred upon her—for echoing his own assertions and conforming to his own course of acting. The court therefore dismissed the suit without pronouncing any sentence of malicious jactitation.<sup>(l)</sup>

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SECT. VIII.—OF ALIMONY.

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1. OF ALIMONY PENDING SUIT.

We now proceed to the consideration of alimony, which is the allowance to be made to a wife for her maintenance either during a matrimonial suit or at its termination, where she has proved herself entitled to a separate maintenance. Alimony, although it properly signifies nourishment or maintenance when strictly taken, yet now, in the common legal and practicable sense, it signifies that proportion of the husband's estate which the wife sues in the ecclesiastical court to have allowed her for her present subsistence and livelihood according to law, upon any such separation from her husband as is not caused by her own elopement or adultery.<sup>(m)</sup> In causes between husband and wife, on the principle that the whole property is supposed by law to be vested in the husband, he is in most cases obliged by law to pay the expenses on both sides, and to allow the wife alimony during the suit.<sup>(n)</sup>

*Who entitled to.*—The court cannot, under any circumstances,

<sup>(l)</sup> *Hawke v. Corri*, 2 Hagg. Cons. R. 289—290; see ante, p. 470—475 as to the effect of sentences.

<sup>(m)</sup> God. Rep. Can. 508.

<sup>(n)</sup> See ante, p. 533; 2 Hagg. Cons. R. 204.

\*make a formal allotment to the wife of any sum in the nature even or as on account of alimony until a fact of [ \*587 ] marriage at least is either proved against or admitted by the husband.(o) The court will recommend however that in effect the wife shall be alimanted proportionably to the husband's means during the long vacation, intimating that it should take this into the account when in the progress of the suit alimony *pendente lite* came to be regularly allotted, if its recommendation were not complied with.(p) After proof of a marriage in fact, alimony pending the suit will be allotted whether it be commenced *by* or *against* the husband,(q) not only in cases of impotency but in all cases of nullity of marriage,(r) and in suits for restitution of conjugal rights or for divorce by reason of adultery or cruelty.(s) In a suit of nullity against the alleged wife the court will not proceed in the suit until the wife is provided with funds for conducting her defence, although fraud in procuring the marriage is expressly charged upon the wife in the libel; and although costs are prayed in the libel, and may ultimately be awarded by the court against the wife.(t)

*Allegation of Faculties.*—Before alimony is allotted an allegation is given in on the part of the wife, stating the property of the husband; such an allegation is called an *allegation of faculties*, to which answers on oath are given by the husband. It is always desirable that such an allegation should be given at an early period, and that the question of alimony should be disposed of in the first stage of the proceedings, to prevent the husband being unnecessarily harassed with suits and demands for his wife's debts.(u) Alimony will not be fixed before the husband has given an answer to the wife's allegation of faculties.(x) The court is especially cautious not to require the disclosure of partnership concerns or matters of business and trade, the only material circumstance in an *\*allegation of faculties* is the amount of the husband's income. [ \*588 ] In such an allegation therefore the amount of capital embarked, or the particulars of partnership concerns, is not to be set forth, but only the income: but if the husband will not fully and fairly disclose his income, then the wife may examine witnesses.(y) But the estimated value of all marketable securities, as a policy of insurance on the husband's life, must be included in the calculation of the husband's income, in order to the allotment of alimony *pendente lite*.(z) In answer to an allegation of faculties it is proper to state that the wife brought no fortune, but not that her father is possessed of a large property.(a) Though it is usual for the parties to accept the answers when reformed by the order of the court, the wife is not compelled to acquiesce in the valuation of her husband, and it is open to her to examine witnesses if she thinks proper; but this is a right not to be exercised wantonly, but with caution and tenderness; it is hardly

(o) *Durant v. Durant*, 1 Addams, 116.

(p) *Smyth v. Smyth*, 2 Addams, 254.

(q) *Bain v. Bain*, 2 Addams, 253;  
*Smyth v. Smyth*, ib. 254; *Wilson v. Wilson*,  
2 Hagg. Cons. R. 204.

(r) *Bird v. Bird*, 1 Lee, 209.

(s) *Oughton*, tit. 206, ss. 1, 2.

(t) *Portsmouth v. Portsmouth*, 3 Addams,

63; *Smith v. Smith*, cited ib. 67.

(u) 2 Hagg. Cons. R. 199.

(x) *Butler v. Butler*, 1 Lee, 38.

(y) *Higgs v. Higgs*, 3 Hagg. Eccl. R.  
472.

(z) *Harris v. Harris*, 1 Hagg. Eccl. R.  
351.

(a) *Ibid.*



ever necessary. in cases of considerable property, to enter into an inquisitorial scrutiny of its exact value, it is to be taken upon a fair general estimate.(b) Where the suit had been instituted by the attorney of the husband (who resided in India) against the wife, by reason of adultery, application was made, after the cause had depended for two years, for alimony. The attorney had given in his answers to the allegation of faculties, but they were insufficient; the court held that the wife might insist upon the personal answers of the husband, however inconvenient on account of his remote residence. In the mean time the court allotted the wife a sum of money on account of alimony, and directed a monition to issue against the attorney, who had so long conducted the cause in his own authority, (no proxy having been exhibited,) for the payment.(c) The court refused to admit an affidavit of the husband as to the value of his income to be read [ \*589 ] in contradiction of an allegation of faculties.(d) The admission of a husband to an allegation of faculties is to be taken strongly against him.(e)

*Right to Alimony when not affected.*—An assignment apparently fraudulent and colourable by the husband of all his property after the commencement of the suit, in trust for his children of a former marriage, will not affect the wife's title to alimony *pendente lite*, but the court will proceed as if no such deed had appeared. For if such a contrivance could avail, no injured wife could ever hope for justice.(f) If the husband, living in public adultery, incurs debts and grants annuities to pay them, he is not entitled to make a deduction in respect of them. The utmost the court would allow would be the interest of the debt, and even then the husband should satisfy the court that the debt was contracted before the adultery with which he is charged was committed.(g)

The husband being an insolvent debtor and possessed of no property, and in no business or profession, the court refused to make any allotment of alimony *pendente lite* to the wife, in a cause of divorce brought by the husband against the wife for adultery, although the father of the husband had considerable property, and had supported his son. But the court suspended the proceedings until something by way of maintenance should be given to the wife.(h)

*Amount of Alimony pending Suit.*—There is no fixed rule as to the amount of alimony, it is in the discretion of the court, which is to be formed from an equitable view of all the circumstances of the case. Alimony *pendente lite* is usually about one-fifth of the annual income, but the proportion must vary according to the circumstances and conduct of the parties.(i) There are a variety of circumstances which will operate in these cases to limit the allowance; as where the husband has children to support; where his income arises not out of substantial property but out of his pay, which is of uncertain dura-

(b) 9 Hagg. Cona. R. 200.

(c) *Fraser v. Fraser*, Cons. Court Lond. 1819, Prynor, 918, n. In *Hawkes v. Hawkes*, 1 Hagg. Eccl. R. 201, the wife admitted the adultery of the husband's attorney, his brother, in the allegation of faculties.

(d) *Goodhall v. Goodhall*, 2 Lee, 264.

(e) *Robinson v. Robinson*, 2 Lee, 593; see 3 Phill. R. 391.

(f) *Brown v. Brown*, 2 Hagg. Eccl. R. 5.

(g) *Rees v. Rees*, 3 Phill. R. 391.

(h) *Bruere v. Bruere*, 1 Curteis, 566.

(i) *Hawkes v. Hawkes*, 1 Hagg. Eccl. R. 526; see 2 Hagg. Cona. R. 201.

tion.(k) Though at the commencement of a suit \*the charge of adultery made against the husband cannot be [ \*590 ] taken as proved, yet it gives a complexion to the case. It is constantly stated against a wife who is proceeded against by her husband for adultery, that though the court cannot assume her guilty of the offence till it has been proved, still that is a sort of charge which ought to make her content to live in decent retirement. On that account a comparatively small allotment is given during the pendency of the suit.(l) But a different principle will apply where the wife is complainant, and although the court will not allow the same amount as where the charge of cruelty or adultery has been established, yet the wife has a right to be maintained with a moderate reference to her former comfortable state. In such a case where the husband's income was about 1500*l.* a year the court allowed her 200*l.* a year in addition to her separate income of 300*l.*(m) Where enormous expenses had been thrown upon the husband in every mode to which female extravagance could apply itself, the court was not disposed to allot any alimony, but with the view of protecting the husband; and in such a case the court, out of an income of 2600*l.* a year, allotted only the sum of 200*l.* to the wife, who was complainant, in addition to her pin money of 200*l.* per annum.(n) The court allotted 75*l.* a year to the wife pending suit out of an income of 250*l.*, although the husband had two children to maintain and to pay the expenses of the suit on both sides.(o) The court allotted alimony *pendente lite* at the rate of 50*l.* per annum out of an income of 140*l.*, and refused to allow the monition not to issue till after fifteen days.(p)

*Commencement of Alimony.*—Payment of alimony is enforced with the view of promoting diligence in the prosecution of suits. Where due diligence is used in the return of the citation, the general rule is to allot alimony from that time.(q) But where a husband takes out and serves a citation \*to answer his own pur- [ \*591 ] poses, and delays the return of it, in such a case the wife will be entitled to alimony from the date of the citation.(r) Alimony *pendente lite* is to be computed from the return only and not from the issue of the citation, although owing to there being no court day such return could not be made till the following Michaelmas term.(s) Where alimony is decreed to commence from the return of the citation, all sums paid subsequent to that return are to be allowed

(k) *Hawkes v. Hawkes*, 1 Hagg. Eccl. R. 536.

(l) *Rees v. Rees*, 3 Phill. 389.

(m) *Smith v. Smith*, 2 Phill. 152.

(n) *Brisco v. Brisco*, 2 Hagg. Cons. R. 199.

(o) *Harris v. Harris*, 1 Hagg. Eccl. R. 353.

(p) *Brown v. Brown*, 2 Hagg. Eccl. R. 5.

(q) 1 Phill. 209. Tunc iudex primo taxabit expensas litis, ac deinde (si sibi constare poterit de facultatibus viri), taxabit huiusmodi sumptus alimonie, juxta ejus arbitrium, in hunc modum taxamus sumptus ali-

monie, pro, qualibet hebdomada a tempore datæ vel relatæ citationis primariæ (si hoc sibi æquum visum fuerit) ad talem summam, solvendam durante lite, nisi aliter per nos decretum fuerit; Oughton, tit. 206, s. 6.

(r) 1 Phill. R. 209. Caveat tamen iudex, ne circumveniantur in taxatione prædicta (videlicet) a die datæ citationis nam aliquando agentes curant citationes extrahi tamen eas exequi et certificari differunt, per annum aut circiter: Qua fraude, per iudicem, comperta, taxare solet expensas, et allocare sumptus alimonie a die executionis, sive relationis citationis; Oughton, tit. 206, s. 8.

(s) *Bain v. Bain*, 2 Addams, 253.

**REVERT PAYMENT.** Thus the amount of all debts which the wife has incurred since that time, and which had been discharged by the husband, are to be repaid. *1* Where the suit was commenced in the Ecclesiastical Court of London, and the wife appealed to the Court of Delegates, a decree of the latter court allowing alimony pending the suit is to be computed from the date of the sentence appealed from, and the interest from the return of the *inhibition* as prayed by the husband, was decreed by the Court of Delegates. *x*

**Reduction of Alimony.**—On motion founded on the affidavit of the husband that subsequent to his answers to the allegation of faculties, &c. in the cause and the allotment of alimony, his income, arising from certain estates in public bodies, had been reduced in several particulars the wife's alimony pending suit was reduced; such reduction to commence after the next quarterly payment. The motion was refused, since the mere affidavit of the husband, but his prayer was in effect answered by the wife. *y*

*z* The alimony actually due must be paid before the ending of the cause. *(z)*

## 2. OF PERMANENT ALIMONY.

**Principles of awarding permanent Alimony.**—Permanent alimony is an allowance to be made to the wife for her maintenance, when she has never herself applied to it, upon which subject the ecclesiastical court has the jurisdiction. Therefore where that court had decreed separation of a wife from her husband on account of his cruelty, and had allotted her alimony, and the husband prayed a prohibition, setting forth that he desired cohabitation and offered security to treat his wife properly, the Court of King's Bench refused it, because the court of the ordinary is the proper jurisdiction for the allowance of alimony. *(a)* But no alimony will be allotted where the wife has eloped from the husband and lives in adultery; nor in the case of a total divorce by reason of some legal impediment whereby the marriage was null and void *ab initio*. *(b)* The law has fixed no definite proportion of the property of the husband and wife to be allotted for permanent alimony, the court must therefore look at all the circumstances together, for no two cases are alike, in order that it may award what is fair and just between the contending parties. Although the amount of alimony to be allotted is in the discretion of the court, it is a *judicial* and not an *arbitrary* discretion, which is to be exercised from an equitable view of all the circumstances of the case. *(c)* A much larger allowance is to be made for permanent alimony than for alimony pending suit. Where the delinquency of the husband has been established, and the wife is the injured party and separated from

(i) *Hamerton v. Hamerton*, 1 Hagg. Eccl. R. 23; *Harris v. Harris*, ib. 353. (a) *Hyott's case*, Cro. Jac. 364; God. Abr. 513; see *Owen's case*, Hettl.  
(u) *Harris v. Harris*, 1 Hagg. Eccl. R. 353. (b) Godolph. Abr. 509.  
(x) *Brisco v. Brisco*, 2 Addams, 259. (c) 2 Phill. R. 41; 3 Phill. R. 389.  
(y) *Cox v. Cox*, 3 Addams, 276.  
(z) *Bird v. Bird*, 1 Lee, 418; see *Bruere*

the comfort of matrimonial society by her husband's misconduct, she will be liberally supported. The law has laid down no exact proportion, it gives sometimes a third—\*sometimes a moiety [ \*593 ] according to circumstances.(d) It seems that a larger proportion is given out of a small than a large income.(e) In *The Countess of Pomfret v. The Earl of Pomfret*,(f) though there was a large fortune and the husband had to maintain the rank and dignity of the peerage, one-third was given, i. e. 4000*l.* out of 12,000*l.* Certainly the wife had brought a large fortune, but then she was elevated in rank by the marriage. Out of an income of 750*l.*, the husband having no state nor family to maintain, 250*l.* a year was allotted to the wife, she taking charge of their only child.(g) In a suit for divorce brought by the wife, repeated and profligate adultery being proved on the part of the husband, (who however had to maintain and educate twelve children,) permanent alimony, at the rate of 600*l.* per annum, (in addition to 120*l.* per annum separate property,) out of a net income of 4000*l.* was allotted from the date of the sentence,—three years before—the cause having in the interval been carried by appeal to the delegates but remitted, no steps being there taken by the appellant, and the remaining delay being occasioned by his absence from the kingdom.(h) Where the husband violates the marriage contract, it might be equitable perhaps, that he should lose the whole benefit of it, and be obliged to give up the whole of his wife's property; at all events it would be most unjust that the wife should be deprived of any considerable portion of the property she brought, in order to support the husband in public scandal, and to enable him to continue his adulterous connection, and to provide for the issue which are the fruits of it. Therefore where the husband had raised himself to independence and affluence by marrying a young woman, whom he not only injured but insulted by debauching a maid servant who lived at the adjoining house, had taken a house for such servant, and for her society had abandoned that of his wife, had children by such servant, received his friends in the house, and introduced her as [ \*594 ] his wife, \*the court gave a moiety of the husband's property to the wife for permanent alimony.(i)

After a decree of separation *a mensa et thoro*, on account of the husband's cruelty and adultery, in one of the grossest cases of misconduct in both particulars that ever came under the notice of the court; the real estate being 6000*l.* a year, subject as alleged by the husband to large incumbrances, the mother's jointure having been 1000*l.* and the wife's pin money 500*l.* a year, the court allotted 1000*l.* a year permanent alimony, allowing the husband to deduct from that sum any payment on account of pin money above 200*l.* a year, the sum agreed to be paid to the wife for the maintenance of the children.(k) Where the delinquency of the husband was very gross, and the greater part of the property came from the wife, but there were children of the marriage to be supported and educated by the hus-

(d) *Otway v. Otway*, 2 Phill. R. 109.

(e) 2 Phill. R. 44.

(f) *Cona. May*, 1791, cited 2 Phill. R. 43.(g) *Kempe v. Kempe*, 1 Hagg. Eccl. R. 532.(h) *Durant v. Durant*, 1 Hagg. Eccl. R. 528.(i) *Cooke v. Cooke*, 2 Phill. R. 40.(k) *Mytton v. Mytton*, 3 Hagg. Eccl. R. 657.

hand, the court gave the wife about one moiety of the income, after deducting the expenses of education. A less proportion will be given where the husband acquires his subsistence by his own personal exertions. In *Biggs v. Biggs* (7*h*) was given: the husband was a seller of venison, and his income stated to be 300*l*. In *Exonson v. Jackson* 30*l*. was given: the husband was a working jeweller, and his income stated to be 300*l*. (m) In estimating the amount of alimony to be allowed to the wife after a separation on the ground of cruelty, the husband is not entitled to a deduction out of what would otherwise be payable by him out of his income, in respect of money lent by wills since marriage to the wife's separate use, nor in respect of his wife's salary as a lady in waiting to the queen: but he is entitled to such a deduction in respect of a pension from the crown granted to his wife. (n)

*When to commence.*—The rule of the court is to decree permanent alimony from the date of the sentence of divorce, (o) though alimony *pendente lite* was neither asked for nor granted. (p) If due [ \*395 ] diligence is used alimony will be given from the date of sentence and the appeal, but where the proceedings are delayed by the wife alimony will be allowed only from the return of the inhibition. (q) In *Gresse v. Gresse*, (r) on an appeal from the consistory, 200*l*. had been given in the court below, an act on petition was entered into in the Arches Court, in which it was stated on the one side, that arrears were due for the alimony given in the court below; and on the other, that the wife had delayed the proceedings; and that alimony was only due from the date of the inhibition. The court granted it only from the return of the inhibition, on the ground that it appeared that the wife had been guilty of delay.

But it will be decreed from the date of the sentence where there is no unnecessary delay, as where the suit was determined in the fourth session of Trinity term in the Consistory; the appeal was prosecuted *instantly*, for an inhibition was prayed in the Arches on the next court day, and on the first session of Michaelmas term the inhibition was returned. The circumstance that the sentence was so late in Trinity term that the inhibition could not be returned till Michaelmas term, was held not to deprive the wife of alimony from the date of the sentence and appeal. (s)

*Appeal in respect of Alimony.*—The allotment of alimony is a grievance for which an appeal lies from the inferior court, (t) although the sentence of separation is acquiesced in. But upon a point where there is no other rule or criterion to guide than the *boni viri arbitrium*, it is only upon a strong difference of opinion where the court of appeal would be disposed to disturb the sentence. Where permanent alimony has been allotted by the local court, the Arches Court of Canterbury has, in several instances, dismissed appeals on the ground that too large a sum has been allotted to the wife. (u) If the sentence

(h) *Chasey v. Chasey*, 5 Phill. R. 109.

(i) *Chasey v. Chasey*, 5 Phill. R. 111, 113.

(m) *Westwood v. Westwood*, 3 Knapp 44.

(n) *Cooke v. Cooke*, 5 Phill. R. 46.

(p) *Aspin v. Aspin*, 1 Hagg. Eccl. R.

(q) *Loreden v. Loreden*, 1 Phill. R. 210, 211.

(r) *Cited* 1 Phill. R. 210.

(s) *Loreden v. Loreden*, 1 Phill. R. 208; see ante, pp. 590, 591.

(t) 3 Phill. R. 389, 396.

(u) *Cooke v. Cooke*, 3 Phill. R. 40; *Street v. Street*, 3 Add. 1.

of the court below were extreme either way, the court of appeal would interfere, in the one case to modify or reduce, and in the other to augment the alimony; so, in \*either case, on that sup- [ \*596 ] position egregiously misallotted. But it is not any mere slight difference of opinion as to the propriety of the allotment in point of amount which would justify such an interference. The court below must have been better informed than the court of appeal can be with respect to the real merits of the whole case as between the parties. It had better means consequently of forming its judgment upon the question, agreeably to those general principles of equity, which are nearly the only ones capable of being brought to bear upon this species of question. For instance, the court below had means of estimating the true nature and degree of the delinquency of the parties with respect to which the court of appeal is comparatively uninformed.(x)

*Alteration of Amount of Alimony.*—Where there is a material alteration of circumstances a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; and if the husband is *lapsus facultatibus*, the wife's allowance ought to be reduced. Where the husband's estate at the time of settling the amount of alimony is subject to deductions as jointures, it is open to the wife to apply for an increase of alimony when the deductions fall in.(y) Applications of this sort are of rare occurrence; in *Foulkes v. Foulkes*(z) an increase was granted. The court refused to reduce alimony on account of an express waiver of a part thereof by the wife—the additional expenses of the husband occasioned by the mature age of children—the failure, from mismanagement of her trustees, of a portion of the funds set apart for the wife's alimony—or slight additions *aliunde* to her means.(a) The reduction of the husband's income by unprofitable speculations is no ground for a proportionate reduction of permanent alimony allotted twenty years before.(b)

*Enforcement of Payment.*—Alimony is allotted for the maintenance of the wife from year to year, the court therefore [ \*597 ] \*will not, without sufficient cause shown for the delay, as the absence of the husband from this country, enforce payment of arrears beyond one year prior to the monition, delay in her application raising an inference that she has made some more beneficial arrangement. In *Wilson v. Wilson*,(c) upon an application by the wife to enforce a monition for the payment of alimony six years in arrear, the court said:—"Unless the husband is absent from the country, or some particular reasons are set forth, it would be productive of great inconvenience and injustice, if, after a lapse of so many years, the court should enforce such a monition. If the wife is aggrieved she should make her application within a reasonable time; otherwise the court will infer she has made some more beneficial

(x) *Street v. Street*, 2 Addams, 2.

(y) *Otway v. Otway*, 2 Phill. R. 109.

(z) Cons. Hil. Term, 1814, cited 3 Hagg. Eccl. R. 329; see *Cox v. Cox*, 3 Addams, 276; ante, p. 591.

(a) *De Blaquiére v. De Blaquiére*, 3 Hagg. Eccl. R. 322.

(b) *Neil v. Neil*, 4 Hagg. Eccl. R. 273.

(c) 3 Hagg. Eccl. R. 329, 330.

arrangement. As a general rule therefore the court is not inclined to enforce arrears of many years standing. Alimony is allotted for the maintenance of a wife from year to year. However as there has in this case been no application to reduce the alimony, but the parties have gone on satisfied with some private arrangement of their own, I think I shall best consult the interests of both by decreeing alimony from one year prior to the monition,—the husband being allowed all payments on account of the wife during that year;—and from the date of the present monition, I shall continue the alimony according to the original decree.” Where both parties had long abstained from applying to the court,—the one for a reduction of alimony, the other to enforce the regular payment,—it will not enforce arrears, nor inquire as to the sums paid by the husband for his wife’s debts incurred by reason of nonpayment of that alimony.(d) The order of the court for payment of alimony will be enforced as in other cases of contempt, and where no sufficient cause is shown for neglecting to comply with a monition personally served, a party may at once be pronounced contumacious, but it is otherwise in the case of a mere informality where the party has virtually obeyed, or is ready to obey the monition.(e) The ecclesiastical court will not hold the enforcement of its [ \*598 ] order for the payment of alimony by reason that the party \*obtaining such order is in contempt of the Court of Queen’s Bench for not delivering up her children to the husband, and is resident out of the country in order to evade the process of that court.(f)

### 3. OF THE JURISDICTION OF THE COURT OF CHANCERY AS TO ALIMONY.

*Court of Chancery has no Jurisdiction to Decree Alimony.*—The ecclesiastical court has not original jurisdiction to decree alimony; such right is incidental to the power of granting divorces, a power not belonging to a court of equity.(g) It is the exclusive province of the ecclesiastical court to determine the amount of alimony, the period of its payment, and what operates as a discharge of it.(h) The decrees of the ecclesiastical court for alimony are only against the person of the husband, but do not affect the husband’s estate so as to take it from his creditors.(i)

It has indeed been said, that upon a writ of *supplicavit* in chancery by the wife for security of the peace against her husband, the court may, as incident to the exercise of that jurisdiction, decree a separate maintenance to her, if the husband refuses to do so.(k) This opinion, however, seems to be erroneous, as there is no modern instance of the exercise of such an authority. There are some old cases in which the court of chancery has decreed alimony

(d) *De Blaquiére v. De Blaquiére*, 3 Dick. 791; *Ball v. Montgomery*, 2 Ves. jun. Hagg. Eccl. R. 322. 195.

(e) *Hamerton v. Hamerton*, 1 Hagg. Eccl. R. 23; see ante, pp. 494—505.

(f) *Greenhill v. Greenhill*, 1 Curteis, 465.

(g) Ante, p. 469; *Wilkes v. Wilkes*,

(h) *Stones v. Cooke*, 8 Sim. 321, n.

(i) *Fitzer v. Fitzer*, 2 Atk. 513.

(k) 2 Ves. Jr. 195; 4 Br. C. C. 339; 2 Br. P. C. 18, 2d ed. See 19 Ves. 397.

to the wife; but whether such decrees proceeded upon a previous divorce in the ecclesiastical court, or upon an agreement between the parties, in many of the cases does not appear.(l) But all these cases, except *Lashbrook v. Tyler*, happened during the time of the commonwealth, when the jurisdiction of the ecclesiastical courts was suspended, and commissioners were appointed to whom jurisdiction was expressly given, and whose decrees were held to be confirmed by the act 12 Car. 2, c. 33, for the confirmation of judicial proceedings.(m) \*On a bill of review to reverse a decree for [ \*599 ] alimony, it was referred to the judges whether the decrees for alimony made in the late times were confirmed by the act for the confirmation of judicial proceedings, and whether bills of review did lie for the reversal of the same. The judges certified that such decrees for alimony made in the court of chancery in those times were confirmed by that act, and that a bill of review did not lie for want of authority in the court of chancery to make such decrees.(n) It is observable, that if courts of equity had an original and concurrent jurisdiction with the spiritual courts, it would have been unnecessary to have given the commissioners, during the troubles, such jurisdiction, and that the doubt which was entertained could not have been raised respecting the validity of their decrees, after the act confirming judicial proceedings.(o) It is now settled that courts of equity have no general authority to decree alimony to the wife, although she may be totally abandoned and deserted by her husband; or she may be driven from his home, and compelled by his ill-treatment and cruelty to seek an asylum elsewhere.(p) Under such circumstances, where the wife has not obtained a decree for alimony in the ecclesiastical court, the proper remedy is by an action in a court of common law, to be brought against the husband by any person who shall under such circumstances supply the wife with necessaries according to her rank and condition; for by compelling the wife thus to leave him, the husband sends her abroad with a general credit for her maintenance.(q)

The court of chancery has no jurisdiction to deliver to the husband the person of his wife; his remedy is in the ecclesiastical court by a suit for restitution of conjugal rights;(r) \*nor to decide [ \*600 ] whether the circumstances of a case will justify a sentence of separation by the latter court.(s)

*Writ of Ne Exeat Regno.*—After a decree for alimony has been obtained in the ecclesiastical court, and the husband, in order to evade payment, is going out of the kingdom, the court of chancery will

(l) *Lashbrook v. Tyler*, 1 Ch. R. 24; *Ash-ton v. Ashton*, 1 Ch. R. 87; *Russell v. Bodwell*, 1 Ch. R. 99; *Whorewood v. Whorewood*, 1 Ch. R. 118; 1 Ch. C. 250.

(m) *Head v. Head*, 3 Atk. 548.

(n) *Whorewood v. Whorewood*, 1 Ch. Rep. 223.

(o) 1 Fonb. Eq. 107.

(p) *Ball v. Montgomery*, 2 Ves. jun. 195; *Head v. Head*, 3 Atk. 550; *Legard v. Johnson*, 3 Ves. 359—361; *Foden v. Finney*, 4 Russ. 438. In *Anon.* 2 Show. 282, it is said, "In the later times they sued for alimony

in chancery, and the judges were then of opinion that there being no spiritual courts, nor civil law, the chancery had the jurisdiction in those days; but now we have courts christian, the chancery will allow of demurrers to such bills for alimony."

(q) *Guy v. Pearkes*, 18 Ves. 196, 197; *Harris v. Morris*, 4 Esp. R. 41; *Hodges v. Hodges*, 1 Esp. R. 441; *Bolton v. Prentice*, 2 Str. 1214; *Hindley v. Westmeath*, 6 B. & C. 200, 213. See post, pp. 646, 647.

(r) 10 Ves. 60.

(s) 1b.



exercise jurisdiction by granting the writ *ne exeat regno*.<sup>(t)</sup> The interference of the court in granting that writ has arisen from the peculiar circumstance, that the ecclesiastical court cannot compel the husband to find bail;<sup>(u)</sup> and if the husband makes it appear that he does not intend to leave the kingdom, the court of chancery will not grant the writ, although he may not intend to pay the alimony which is due from him.<sup>(x)</sup> This and the case of an account seem to be the only instances in which a writ *ne exeat regno* will be granted where the demand is not merely *equitable*.<sup>(y)</sup> It is clearly settled that the court will grant a writ *ne exeat regno* for arrears of alimony actually due;<sup>(z)</sup> but the court will not go further, for neither courts of law nor courts of equity are entitled to judge whether a woman is entitled to alimony or not, or what she shall ever get.<sup>(a)</sup> The court will grant the writ *ne exeat regno* for a gross sum actually due on a sentence obtained in the ecclesiastical court.<sup>(b)</sup> But before a decree is made for alimony and separation, the court will not interfere, for it cannot take for granted that there will be a decree, and shut up the husband pending the suit in anticipation of such a decree.<sup>(c)</sup> The writ in all these cases must be marked for the sum actually due; it cannot be for the value of the annuity given for alimony.<sup>(d)</sup> But although there should have been a decree for alimony, the writ will not issue pending an appeal by the husband against the sentence allotting alimony on the ground that, according to the practice of the [ \*601 ] ecclesiastical courts, if there is an appeal, the alimony given by the decree is not understood to be due.<sup>(e)</sup> In *Roebuck v. Roebuck*<sup>(f)</sup> the wife obtained a sentence in a cause for adultery, establishing her innocence, alimony was decreed to her in 1785. Afterwards she appealed, not conceiving the alimony sufficient. Pending that appeal she filed a bill for a writ of *ne exeat regno*, her husband threatened to leave the kingdom to avoid paying the alimony already decreed and the increase, and the writ was marked for 600*l.*, and was granted pending the appeal for an increase of alimony.

A wife applied for a writ *ne exeat regno* to prevent her husband from leaving the kingdom, which he threatened, till a suit instituted by her against him in the ecclesiastical court for alimony, charging him with cruelty and adultery should be determined. The lord chancellor asked for what sum the writ should be marked, and upon being told that it must be left to the discretion of the court, he said that the question he asked was an insurmountable objection, and thought that it could not be done under a notion of aiding the ecclesiastical court.<sup>(g)</sup> An affidavit to found such a writ upon must not only say

(t) *Head v. Head*, 3, Atk. 295; *Vandergrucht v. De Blaquiére*, 8 Sim. 322; *Pearne v. Lisle*, Amb. 75; *Smithson's case*, 2 Ventr. 345.

(u) *Pearne v. Lisle*, Amb. 75.

(x) 8 Sim. 322.

(y) *Anon.* 2 Atk. 210; *Hosden v. Rogers*, 1 Ves. & B. 129.

(z) *Read v. Read*, 1 Ch. Cas. 115; 2 Ch. 19; *Ex parte Whitmore*, Dick. 143.

(a) *Haffey v. Haffey*, 14 Ves. 261; see

*Cock v. Ravie*, 6 Ves. 283.

(b) *Shafte v. Shafte*, 7 Ves. 172.

(c) *Ibid.*

(d) *Dawson v. Dawson*, 7 Ves. 172.

(e) *Street v. Street*, Turn. & Russ. 322.

(f) Cited 7 Ves. 172; Reg. lib. B. 1787, fol. 7; 1 Ves. Jun. 95, n.

(g) *Coglar v. Coglar*, 1 Ves. Jun. 94. It does not appear what became of this case. See Beames on *Ne Exeat Regno*, 42, 2d ed.

that the defendant is indebted in such a sum, but also mention the facts on which it arises, and on which it is grounded.<sup>(h)</sup> The rule is, that there must be an affidavit positive to the extent that the husband is going abroad, or some declaration that he is.<sup>(i)</sup>

*Arrears of Alimony not recoverable in Equity.*—A bill cannot be maintained for arrears of alimony *due* at the wife's death by her executors against her husband. In *Stones v. Cooke*,<sup>(k)</sup> a bill was filed by the executors of the defendant's deceased wife for an account and payment of arrears due at the wife's death for alimony which the defendant had been ordered, by a decree of the ecclesiastical court, to pay to her. The defendant put in a general demurrer. Sir L. Shadwell, V. C. after having consulted the judges of the ecclesiastical \*courts, said, that the better opinion seemed to be that [ \*602 ] the ecclesiastical court would allow the wife's executors to enforce payment of the arrears of alimony against the husband. If that were so, the bill was unnecessary, as the principle on which the court grants a *ne exeat* against the husband is, that the ecclesiastical court has no power to compel him to give bail. But as it was not so clear that the ecclesiastical court would, in a case like the present, decree an account and payment of alimony as to justify him in allowing the demurrer, it was overruled. But on appeal, Lord Lyndhurst, Chancellor,<sup>(l)</sup> allowed the demurrer, who said that the argument that the party would be without remedy, because executors could not maintain a suit in the ecclesiastical court, operated against the bill, as showing that the claim must cease with the wife's death. There was no instance of such a bill filed against a husband, nor did the authorities warrant it. The cases in which the court had granted a writ of *ne exeat regno* did not warrant it, and the noninterference of the ecclesiastical court did not found any jurisdiction in the court of chancery.<sup>(m)</sup>

*Alimony not chargeable as separate Estate.*—In a recent case an attempt was made to assimilate alimony to property settled to the separate use of a woman, but the court denied the similitude; alimony is liable to be varied by the ecclesiastical court according to the husband's circumstances, but separate property remains the same whatever alteration may take place in the husband's circumstances, and whether he is living or dead, or whether he is abroad or not. A married woman, divorced from her husband and entitled to alimony under the sentence of the ecclesiastical court, accepted a bill of exchange for articles of dress, supplied to her by the drawer, and made it payable at her banker's, to whom her alimony was paid. It was held that she did not thereby charge her alimony. In this case a bill was filed by the husband of a milliner against a lady and her trustees, named in a deed of separation between her and her husband; and it prayed an injunction to restrain the payment of certain sums to the wife until the plaintiff was paid a bill of 225*l.* due [ \*603 ] to \*him for millinery. The facts were as follows: in

(h) *Anon.* 2 Ves. sen. 489; 1 Br. C. C. 375.

(i) *Oldham v. Oldham*, 7 Ves. 410.

(k) 7 Sim. 22.

(l) Approved by Lord Cottenham, 3 Jurist, 1116.

(m) *Stones v. Cooke*, 8 Sim. 321, n.

In *Watkyns v. Watkyns*,<sup>(s)</sup> where the husband was gone abroad, and left his wife unprovided for, the court laid hands on the fund which [ \*606 ] was in the power of the \*court, and directed payment of the interest to the wife until the husband returned, and maintained her as he ought. And where the husband had, after a sentence for alimony in the ecclesiastical court, made over his whole estate to trustees, and then went to the West Indies, the court, upon a bill brought by the wife against the trustees, directed them to pay her a considerable maintenance out of the trust estate, whilst the husband resided abroad.<sup>(t)</sup> Notwithstanding the wife's equity to have her own life interest applied for her benefit, where it has not been reduced into possession by the husband, the wife will not be entitled to the whole dividends as against an assignment by the husband; but the sum will be ordered to be paid to her during the absence of her husband. If there be no evidence of the wife being left unprovided for, an inquiry will be directed whether the husband lives abroad, and has made no provision for his wife.<sup>(u)</sup> So advances to a married woman for her maintenance, who was deserted by her husband, on the credit of her fund in court, which exceeded the income of the fund, were ordered to be reimbursed out of the capital.<sup>(x)</sup>

There are instances in bankruptcy of allowing the whole of the wife's life-interest to her;<sup>(y)</sup> but in subsequent cases it has been held that the assignees of the bankrupt husband were entitled to the life-interest of the wife, subject only to the equity, requiring some provision for her out of that interest.<sup>(z)</sup>

A divorce obtained by a wife against her husband on the ground of adultery and ill-treatment, after his bankruptcy, does not entitle her in equity to the *whole* of a fund bequeathed to her, which came into possession after the bankruptcy, although no settlement was made upon her at her marriage, and her husband at that time received 1500*l.* stock in her right; but a reference was made for approving a proper settlement on the wife.<sup>(a)</sup>

[ \*607 ] \*The situation of an insolvent is very different from that of a bankrupt, as the whole of his after-acquired property will go to his creditors; therefore the court ordered the whole of the money in court belonging to a married woman, whose husband had taken advantage of the insolvent act, to be applied for the benefit of her and her children.<sup>(b)</sup> But money in court belonging to a married woman, if less than 200*l.* (which is the lowest sum for which the court gives the wife the benefit of an equity for a settlement,) will be ordered to be paid to the husband, though she has been deserted by him, and opposes the petition.<sup>(c)</sup> Equitable relief will not be granted to the wife, who has other sufficient means of support secured to her.<sup>(d)</sup> But where a woman leaves her husband without any justifiable cause, and he is willing to support her; or where she elopes, and lives in

(s) 2 Atk. 96. 98; *Sleech v. Thorington*, 2 Ves. sen. 560.

(t) *Head v. Head*, 3 Atk. 295. 550.

(u) *Wright v. Morley*, 11 Ves. 18. 23.

(x) *Guy v. Pearkes*, 18 Ves. 195.

(y) 2 Vern. 196; 1 Atk. 192.

(z) *Prior v. Hill*, 4 Br. C. C. 139; *Oswell Probert*, 2 Ves. jun. 680; *Burdon v. Dean*,

ib. 607; *Brown v. Clark*, 3 Ves. 166; *Lamb v. Milnes*, 5 Ves. 517; *Wright v. Morley*, 11 Ves. 21.

(a) *Green v. Otte*, 1 Sim. & Stu. 250.

(b) *Brett v. Greenwell*, 3 Y. & Coll. 230.

(c) *Foden v. Finney*, 4 Rums. 428; 1 Jac. & W. 69.

(d) *Aguilar v. Aguilar*, 5 Madd. 414.

adultery, a court of equity will lend her no aid for obtaining a separate maintenance.(e) So the court refused to decree maintenance where the husband and wife lived separate by mutual consent, and there was no evidence of any cruelty on the part of the husband, and who had before marriage settled part of her property upon her.(f)

(e) *Bullock v. Menzies*, 4 Ves. 798; ante, p. 421. (f) *Duncan v. Duncan*, Coop. C. C. 254; 19 Ves. 394.

## \*CHAPTER VI.

[ \*608 ]

## OF VOLUNTARY SEPARATION BETWEEN HUSBAND AND WIFE, AND MATTERS INCIDENT THERETO.

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## SECT. I.—OF DEEDS OF SEPARATION.

*Validity of Deeds of Separation established.*—For some time a doctrine prevailed in the courts of law that a man and his wife might by agreement make themselves separate persons to all intents and purposes,(a) but it is now settled that a husband and wife cannot by agreement between themselves change their legal capacities and characters resulting from the state of marriage while it subsists.(b)

There are many cases in which by agreement a married woman is, for some purposes, placed in the situation of a *feme sole*; as where she has pin-money, or a separate provision, either secured at marriage, or arising from the bounty of a friend or relation. There is no doubt that a woman before marriage may contract for those rights, though it may be considered doubtful whether it be likely to promote domestic happiness.(c)

A bequest of an allowance to a *feme covert* upon condition \*that she lived apart from her husband was held void, [ \*609 ] as being *contra bonos mores*.(d) And Lord Eldon is reported to have said, it may be a question if a relation or stranger gives a married woman an annuity on condition of her living separate from her husband, whether it would be good; and if not, the question arises whether the husband and wife can make a contract, the effect of which is the same.(e)

(a) *Corbet v. Poelnitz*, 1 T. R. 5; see 1 Dow & Clark, 543.

(b) *Marshall v. Rutton*, 8 T. R. 545.

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(c) Jac. 137.

(d) *Brown v. Peck*, 1 Eden, 140.

(e) *Westmeath v. Westmeath*, Jac. 137.

In *Watkins v. Watkins*,<sup>(s)</sup> where the husband was gone abroad, and left his wife unprovided for, the court laid hands on the fund which [ \*606 ] was in the power of the \*court, and directed payment of the interest to the wife until the husband returned, and maintained her as he ought. And where the husband had, after a sentence for alimony in the ecclesiastical court, made over his whole estate to trustees, and then went to the West Indies, the court, upon a bill brought by the wife against the trustees, directed them to pay her a considerable maintenance out of the trust estate, whilst the husband resided abroad.<sup>(t)</sup> Notwithstanding the wife's equity to have her own life interest applied for her benefit, where it has not been reduced into possession by the husband, the wife will not be entitled to the whole dividends as against an assignment by the husband; but the sum will be ordered to be paid to her during the absence of her husband. If there be no evidence of the wife being left unprovided for, an inquiry will be directed whether the husband lives abroad, and has made no provision for his wife.<sup>(u)</sup> So advances to a married woman for her maintenance, who was deserted by her husband, on the credit of her fund in court, which exceeded the income of the fund, were ordered to be reimbursed out of the capital.<sup>(x)</sup>

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(s) 2 Atk. 96. 98; *Sleech v. Thorington*, ib. 607; *Brown v. Clark*, 3 Ves. 166; *Lamb v. Milnes*, 5 Ves. 517; *Wright v. Morley*, 11 Ves. 21.

(t) *Head v. Head*, 3 Atk. 295. 550.

(u) *Wright v. Morley*, 11 Ves. 18. 23.

(x) *Guy v. Pearkes*, 18 Ves. 195.

(y) 2 Vern. 196; 1 Atk. 192.

(z) *Prior v. Hill*, 4 Br. C. C. 139; *Oswell & Probert*, 2 Ves. jun. 680; *Burdon v. Dean*,

(a) *Green v. Otte*, 1 Sim. & Stu. 250.

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## OF VOLUNTARY SEPARATION BETWEEN HUSBAND AND WIFE, AND MATTERS INCIDENT THERETO.

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## SECT. I.—OF DEEDS OF SEPARATION.

*Validity of Deeds of Separation established.*—For some time a doctrine prevailed in the courts of law that a man and his wife might by agreement make themselves separate persons to all intents and purposes,(a) but it is now settled that a husband and wife cannot by agreement between themselves change their legal capacities and characters resulting from the state of marriage while it subsists.(b)

There are many cases in which by agreement a married woman is, for some purposes, placed in the situation of a *feme sole*; as where she has pin-money, or a separate provision, either secured at marriage, or arising from the bounty of a friend or relation. There is no doubt that a woman before marriage may contract for those rights, though it may be considered doubtful whether it be likely to promote domestic happiness.(c)

A bequest of an allowance to a *feme covert* upon condition \*that she lived apart from her husband was held void, [ \*609 ] as being *contra bonos mores*.(d) And Lord Eldon is reported to have said, it may be a question if a relation or stranger gives a married woman an annuity on condition of her living separate from her husband, whether it would be good; and if not, the question arises whether the husband and wife can make a contract, the effect of which is the same.(e)

(a) *Corbet v. Poelnitz*, 1 T. R. 5; see 1 Dow & Clark, 543.

(b) *Marshall v. Rutton*, 8 T. R. 545.

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(c) Jac. 137.

(d) *Brown v. Peck*, 1 Eden, 140.

(e) *Westmeath v. Westmeath*, Jac. 137.

Deeds of separation have been regarded in an unfavourable light both in courts of law and equity, and questions frequently arise with respect to the validity and effect of such deeds.

Many decisions have established that deeds for the separation of married persons may be valid and effectual for some purposes, both at law<sup>(f)</sup> and in equity.<sup>(g)</sup> Provided their object be an actual and immediate, and not a contingent or *future* separation.

The highest authorities have frequently asserted that deeds of separation are at variance with the policy of the law.

Many of the judges who have given effect to such deeds for any purpose have expressly declared that they adopted them to that extent with reluctance, and would have paused if the question had been new. Lord Eldon expressed himself to that effect in several cases,<sup>(h)</sup> and on the last occasion when the subject was discussed by his lordship, he said, "according to the law of this country marriage is an indissoluble contract. It can only be dissolved *a vinculo matrimonii* by the legislature; and that contract once entered into imposes upon the husband and wife, both with respect to themselves and with respect to their offspring, most important and sacred duties; so important and so sacred, that it does seem a little astonishing that it ever should have happened that it should be thought they could, by a mutual agreement between themselves, destroy all the duties they owe to each other, and all the duties they owe to their offspring. I do not go through [ \*610 ] what has been stated in a great variety of cases upon the \*subject, nor do I refer to them for any other purpose than that of stating that which I think can admit of no contradiction, that it is impossible for any person to read the judgments I have had the honour to pronounce upon the subject, without seeing that I never could originally have been a party to any such doctrine. But when decision followed decision; when men whose professional knowledge, whose talents and whose abilities I was bound not only to respect but to revere, had so often, in courts of law, stated doctrines to which I could not agree, it seemed to me a most improper thing that I should take upon myself to say that those doctrines were wrong without putting the matter into the most solemn course of inquiry; and I believe it will be found, if your lordships look at the judgments to which I am referring, that I was always exceedingly anxious that a case of this important nature should be brought before the house of lords."<sup>(i)</sup>

Bayley, J. said,<sup>(k)</sup> as to the general question with respect to the validity of such deeds, that he was of opinion, that as it has for so long a period of time been the system of jurisprudence to hold such deeds valid, it is not for this court to entertain the question that has been proposed. If any alteration is to be made in the law as now understood, it must be by a decision of the house of lords, or by an act of the legislature.

(f) *Lister's case*, 8 Mod. 22; *Rex v. John v. St. John*, 11 Ves. 526; *Westmeath v. Mead*, 1 Burr. 542. *Westmeath*, Jac. 126.

(g) *Oxenden v. Oxenden*, 2 Vern. 493; (i) *Westmeath v. Salisbury*, 5 Bligh, N. S. 339; 1 Dow & Clark, 544. *Nicholls v. Danvers*, ib. 671; *Williams v. Callow*, ib. 752.

(k) *Jee v. Thurlow*, 2 B. & C. 552.

(h) *Beard v. Webb*, 2 Bos. & P. 93; St.

From the incapacity of a married woman to contract or to possess personal property which may be the subject of contract, men and their wives desirous of living separate have found it necessary to have recourse to the intervention of trustees, in whom the property, of which it is intended she shall have the disposition, may vest uncontrolled by the rights of the husband, and with whom he may contract for her benefit.<sup>(l)</sup>

*Deeds providing for future Separation are void.*—A deed made for the future separation of the husband and wife is void. In *Durant v. Titley*,<sup>(m)</sup> by a deed between the husband and wife of the one part, and a trustee of the other \*part, after reciting the marriage [ \*611 ] and subsisting differences, the husband covenanted with the trustee to pay an annuity during the joint lives of the husband and wife *in case she should live separate and apart from her husband, and should take one of her children by her said husband to live with her*, and it was further agreed that it should be lawful for her, whenever she should live apart from her husband, to take any one of her children by her husband which she should fix upon, to reside and live with her, except the eldest.

The husband and wife lived together for seven years after the execution of the deed, and at the end of that time the wife, without the consent and against the will of her husband, left him, and continued to live apart. In an action of covenant by the trustee against the husband the deed was held to be void, on the ground that it was made in contemplation of a future separation at the pleasure of the wife, and therefore contrary to the policy of marriage.

The grounds of the decision are not given by the reporter, but the objections taken to the action were, first, that the deed being made in contemplation of a *future* separation at the *pleasure* of the wife, it was contrary to the policy of marriage and void in law; secondly, that as the deed contemplated a separation in the state in which the family then was, and provided a maintenance for the wife and one of the *then existing* children, it did not therefore apply to the event which had happened, of the wife leaving her husband and taking with her an after-born child.

Lord Tenterden said<sup>(n)</sup>, “the judges who decided the case of *Durant v. Titley* did not intend to shake any former decision. They thought it different from all the former cases, inasmuch as the deed provided for the future separation of the husband and wife, who at the time of making the deed were living together.”

Where parties execute a deed by which they agree to separate from each other, but at the same time it is stipulated between them verbally that they shall continue to live together, and they do in fact continue to live together after that \*deed has been exe- [ \*612 ] cuted, in pursuance of that agreement residing in the same house, although they may not cohabit together as husband and wife, under such circumstances such a deed cannot in point of law be sustained.<sup>(o)</sup>

(l) 8 T. R. 547.

(m) 7 Price, 577.

(n) *Jes v. Thurlow*, 2 B. & C. 551.

(o) *Hindley v. Westmeath*, 6 B. & C. 200;  
*Westmeath v. Salisbury*, 5 Bligh, N. S. 395.



This point was the subject of much discussion in the following case, in which, by a deed dated in 1817, after reciting that disputes had existed between the earl and his wife, and had arisen to such a height that they were on the point of separating and living apart, but by the intervention of mutual friends the wife had consented to cohabit with the husband after he had executed this deed, making such provision for their issue, and such provisional maintenance for the wife as thereafter mentioned; it was witnessed that in consideration that the wife had consented to cohabit with the husband, he had covenanted with S. (a trustee) to convey estates to his use for the term of ninety-nine years. The trusts of this term were that in case it should unfortunately happen that the wife should find herself compelled to cease to live and cohabit with her husband, or to live separate and apart from him "that then and in such case the trustee should, during the joint lives of the husband and wife, raise out of the rents, or by sale or mortgage of the term, such clear annual sum as should then by the advice of their mutual friends be agreed upon to be a proper and sufficient sum for the separate maintenance of the wife. The husband also covenanted that on such separation so taking place as aforesaid, he would enter into such articles of separation as are usual in such cases, and necessary for the security and comfort of the wife. The deed contained no covenant by the trustee for indemnifying the husband against the debts of the wife. After the execution of this deed, the husband and wife continued to live together.

By an indenture in 1818, made between the husband and wife and trustees, after reciting that the husband at the desire of the wife had desired to live separate and apart from her, and to allow her a separate maintenance, the husband demised the estate to trustees for a term to raise provisions for the wife and infant daughter; and the [ \*613 ] husband covenanted that the \*wife might live separate and apart from him and free from his authority and control, &c. this deed contained no indemnity against debts. The parties continued to live in the same house although they slept in separate rooms, and met at board and appeared in the world as man and wife until June, 1819, when they finally separated.

In an action against the husband for goods sold and delivered to the wife whilst she was living apart from her husband against his will and contrary to his entreaties that she would return to his house, the court thought that it was impossible to contend that the first deed was valid, it being in terms like the deed in *Durant v. Titley*; (p) and that the second deed, executed in August, 1818, was not intended to be accompanied by an immediate actual separation of the parties at the time it was executed, and that not being accompanied nor intended to be accompanied by such actual separation, it was not valid from the beginning, and that even if it had been valid at first, it had been avoided by what amounted to a subsequent reconciliation of the parties. (q)

In the year 1822, the trustees named in the deed of 1818, having distrained upon the tenants of the land charged with the annuity

(p) *Ante*, p. 611.

(q) *Hindley v. Westmoreland*, 6 B. & C. 200.

secured to the wife, the husband filed a bill in the court of chancery in Ireland, praying that the deeds might be set aside and delivered up to be cancelled; it was decreed that the deed of 17th December, 1817, was void, so far as the wife or her trustee sought any benefit under it. As to the remainder of the suit, the bill was ordered to be retained for twelve months, with liberty for the parties to proceed at law as they might be advised. Neither of the parties having availed themselves of this liberty, the husband appealed to the house of lords. The lord chancellor and Lord Eldon were clearly of opinion that the deed of 1817, providing for a future separation, could not be supported. And it was finally declared that the deed of 1818, so far as the marchioness or her trustees sought any benefit under it, was void in law, and with this declaration the cause \*was [ \*614 ] remitted to the court of chancery in Ireland, to do therein as should be just and consistent with such declaration.(s)

A bill had been filed in the court of chancery in England against the marchioness and her children, and the trustees praying that the deeds might be delivered up to be cancelled, or that so much of them as provided a separate maintenance for the marchioness and for the children might be declared to be void, and an injunction in the mean time, the plaintiff being willing to live with and support his wife and children according to his means and station in life. The common injunction having issued, the order *nisi* was obtained upon the answers being filed, and no cause being shown, the injunction was dissolved. Lord Eldon, however, on a motion to revive the injunction, refused to do so, but left the parties to try the validity of the deeds at law.(t)

*Future Separation, with Approbation of Trustees.*—In one case, a provision for the wife, in the event of a future separation from her husband, was supported, on the ground that the intervention of impartial persons was required to decide whether sufficient cause of separation did or did not exist.

In *Lord Rodney v. Chambers*,(u) certain annuities, to which the wife was entitled, were assigned to trustees upon certain trusts, and upon further trust, in case any separation should thereafter take place between the husband and wife, *with the approbation of the trustees*, then upon trust to pay the annuity to the separate use of the wife. The husband covenanted that in case future differences should arise between him and his wife, that she might live separate without his molestation. The husband also covenanted to pay an annuity to the trustees during his wife's life for her benefit, in the event of the determination of the annuity before assigned. A separation took place a few months after the execution of the deed, with the approbation of the trustees. In an action of covenant by the trustees for three quarters of the annuity covenanted to be paid by the husband, it was contended that the deed was void, inasmuch as it made provision for a future separation.

\*But Lord Ellenborough, C. J. said, "the question [ \*615 ] which has been agitated appears to have been laid at rest

(s) *Westmeath v. Salisbury*, 5 Bligh, N. S. 339; 1 Dow & Clark, 519.

(t) *Westmeath v. Westmeath*, Jacob, 126.

(u) 2 East, 283.

for a long period, by repeated decisions and the uniform practice of the courts. If it were now a new question whether any contract could by law be made, which tended to facilitate the separation of husband and wife, I should have thought that it would have fallen in better with the general policy of the law to have prohibited any such contract; but they are now become inveterate in the law, and we cannot reject the present on that ground, without saying that all contracts which have the same tendency are vicious, which would extend, for aught I see, to provisions for pin money, or any other separate provision for the wife, which tends to render her independent of the support and protection of her husband." The covenant was held to be valid.

In *Chambers v. Caulfield*,<sup>(w)</sup> where the same deed was set up by the defendant in bar to an action for criminal conversation, Lawrence, J., one of the judges, who concurred in the former decision, observed, "in that case there was an averment that the separation was with the consent of trustees. We thought there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the ecclesiastical court for a divorce and alimony. The court therefore only decided in that case that a covenant for separation and separate maintenance, with the consent of the trustees, was good; not that a covenant was good generally that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights."

Bayley, J. said,<sup>(x)</sup> "In the case of *Durant v. Tilley* the contract provided for the future separation at the will of the wife; it was offering a premium to her for leaving her husband. In *Lord Rodney v. Chambers* that objection did not apply, for the intervention of impartial persons was then required to decide whether sufficient cause of separation did or did not exist."

Lord Denman said<sup>(y)</sup> the case of *Rodney v. Chambers* [ \*616 ] had "received some severe shocks from the strictures of Lord Eldon in *St. John v. St. John*,<sup>(z)</sup> and must be considered as directly overturned by the King's Bench in *Hindley v. Lord Westmeath*,<sup>(a)</sup> though it is difficult to explain why a present separation is less contrary to public policy than the agreement to give effect to one, if rendered necessary by circumstances, at a future time." It is observable however that in the last case the intervention of trustees was not required, and that the decision turned very much upon the subsequent reconciliation of the parties.

In one instance<sup>(b)</sup> a stipulation in a settlement made previously to

(w) 6 East, 252; see ante, p. 390.

(x) See *v. Thurlow*, 2 B. & C. 551.

(y) 7 Scott, 337.

(z) 11 Ves. 529.

(a) 6 B. & C. 200, ante, p. 613.

(b) *Hoare v. Hoare*, 2 Ridgway's P. C. in Ireland, 268. The wife was entitled for life to two annuities, amounting to 400*l.*, which before her marriage were vested in trustees, upon trust that if a separation should afterwards take place between her

trustees should permit her to take to her separate use a moiety of the annuities of 400*l.* during such separation, and should permit her husband to receive the other moiety; but that if a separation took place by his means, or at his instance, then that she should receive the whole of the 400*l.* annuities for her separate use during the marriage. It seems that a separation took place in consequence of the cruelty and misconduct of the husband; and a bill was filed by the wife in the Court of Chancery in Ireland to enjoin

her future husband at her instance, the

marriage, making a provision for the wife in the event of a separation between her and her husband, was upheld by the Irish house of lords; but this case must now be considered erroneous,(c) and overruled by subsequent cases.

*Consideration for Execution of Deed of Separation.*—An engagement to pay a sum of money as an inducement for a [ \*617 ] \*future separation of a man from his wife is contrary to law. But the execution of a deed of separation between a husband and his wife, which had previously been drawn up, is a legal consideration for a promise by a third party (a trustee) to pay money for which the husband was solely liable.(d) The facts, as they appeared upon the record, were these; that, by a deed of separation between the plaintiff and his wife, (not executed at the time the agreement in question was made,) he was to 'quit a house on a certain day; and that some annuity was mentioned in that deed, that afterwards by the written agreement, on which the action was brought, the time for quitting the house was extended; that the plaintiff agreed to pay certain household expenses and debts to which he was before liable; and that in consideration of such agreement, and of his *executing* the deed of separation, the defendant promised to pay certain sums towards the above-mentioned household expenses and debts. It was clear that for some reason (and the court would not presume an illegal one) a separation between the plaintiff and his wife had been determined upon, the terms of which had been reduced into writing; that the plaintiff for some reason or other not apparent, had not executed the deed, and that he was induced to execute it by the defendant's promise, which was in effect a promise to indemnify the plaintiff from, among other things a part of the by-gone household expenses at the house which the plaintiff was to quit. The court assumed the deed of separation to be legal, because no illegality was shown; and the defendant's promise was held to be legal, because it was not that the husband should separate from his wife, but that he should complete the instruments and arrangements of a separation previously determined upon.(e) Lords Abinger and Denman did not concur in the judgment, principally on the ground that *prima facie* deeds of separation are illegal, where no justifiable cause of separation is shown. And whether the court was at liberty or not to presume, in the

the husband from intermeddling with the annuities, and to restrain the trustees from paying any part of them to him, and praying that the trustees might pay the whole of the annuities to the wife under the above provision in the settlement, and for a receiver. The husband stated in his answer that he had always used his wife with tenderness and affection, and he offered to take her back and treat her as his wife. Upon the evidence and the pleadings, the court ordered a moiety of the annuities to be paid to her until cohabitation or further order, to commence from the time of the separation. The wife being dissatisfied with this decree, appealed from it to the then house of lords in that country, claiming the whole of the annuities under the above settlement. All

objections as to the jurisdiction of ecclesiastical courts, and in relation to the immorality and illegality of the agreement were urged, and moreover that it was an agreement for a divorce instead of a marriage; and it was further contended, that the husband having judicially offered to take his wife back again, had determined the separation. But the house of lords were not moved by these arguments. It varied the decree and ordered the whole of the annuities to be paid to the wife, until she and her husband should cohabit, or till the further order of the court below.

(c) See 7 Scott, 338.

(d) *Waite v. Jones*, 1 Scott, 730; 1 Bing. N. R. 656; 1 Hodges, 166.

(e) *Id.*; *Jones v. Waite*, 7 Scott, 317; Bing. N. R. 363.

[ \*618 ] absence of all suggestion upon the subject, that there might \*have been a lawful cause for the husband to separate from his wife, that the promise of money to be paid to him could not have been a lawful inducement, whether it was the exclusive or the partial consideration upon which he agreed to execute a deed of separation. Lord Abinger said "that the proposition that as the law will recognize the legality of deeds of separation, by allowing actions of covenant to be maintained upon them, it cannot be presumed that they are illegal; and that if they be not illegal, of course the execution of such a deed by the husband cannot be illegal, must at least receive this qualification; that the consideration which prevails on the husband to make such a deed be a good consideration in law to justify him in separating from his wife. There are certain circumstances which will induce the ecclesiastical court to pronounce a decree of divorce *a mensa et thoro*; and it may not be unlawful for a man under the same circumstances voluntarily to agree to do that which the law, if he refused, would compel him to do. Upon this ground, a deed of separation, made upon due consideration, may well be considered as not unlawful."<sup>(e)</sup> Lord Denman said, if he could venture to lay down the principle which alone seems to be safely deducible from all the cases, it is this, that when a husband has by his deed acknowledged his wife to have just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation, on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant.<sup>(f)</sup>

In an action of *assumpsit*, founded on an alleged engagement by the defendant to execute a deed of separation from his wife, with a covenant to pay the plaintiffs, her father and brother, a yearly sum of money for her maintenance, the plaintiffs were nonsuited, on the ground of want of evidence to prove the agreement.<sup>(g)</sup>

*Covenant to Indemnify the Husband against Wife's Debts.*—Deeds of separation, making provision for the wife, usually [ \*619 ] \*contain a covenant by the trustees with the husband to indemnify him against the debts which the wife may contract during the separation. Such a covenant is a valuable consideration to support the deed against the husband's creditors,<sup>(h)</sup> and will be a legal foundation for a covenant on the husband's part to provide a specific maintenance for the wife.<sup>(i)</sup> And if there be a covenant by a third person to indemnify the husband against the wife's debts, the court of chancery will enforce the husband's covenant for the payment of an annuity to the wife.<sup>(j)</sup>

A covenant by a third party to indemnify the husband against the wife's debts, is a sufficient consideration for supporting a deed of sep-

(e) *Jones v. Waite*, 7 Scott, 332; 5 Bing. N. R. 363. See post, 623.

(f) *Jones v. Waite*, 7 Scott, 338; 5 Bing. N. R. 363.

(g) *Elworthy v. Bird*, 13 Price, 222; 1 M. & Cl. 69. See *Scholey v. Goodman*, 1 Carr. & P. 36; 1 Bing. 349.

(h) *Angier v. Angier*, Gilb. Eq. R. 152; *Stephens v. Olive*, 2 Br. C. C. 90; *Fitzler v.*

*Fitzler*, 2 Atk. 511; *Duffield v. Scott*, 3 T. R. 374; *Compton v. Collison*, 2 Br. C. C. 377; *Jee v. Thurlow*, 2 B. & C. 553.

(i) *Westmeath v. Westmeath*, 5 Bligh, N. S. 375; *Legard v. Johnson*, 3 Ves. 359; *Seeling v. Crawley*, 2 Vern. 386.

(j) *Logan v. Kirkett*, 1 Mylne & K. 225; *Elworthy v. Bird*, 2 Sim. & Sta. 281; see post, p. 633—638.

aration against the husband's creditors, although Lord Eldon, if not bound by positive decisions, thought that it was impossible to show that it ought originally to have made any difference whether there was or was not such a covenant.<sup>(k)</sup> In *Stephens v. Olive*<sup>(l)</sup> the husband was entitled to certain real estates for his life, subject to a mortgage for 500*l.*, and he and his wife agreed to live apart; he therefore conveyed his life estate to trustees; first, to keep down the interest of the mortgage, then to pay taxes, &c.; and finally, an annuity of 35*l.* to the wife for separate maintenance. The trustees covenanted to indemnify the husband against the debts which the wife might contract after the separation. The trustee entered into possession of the premises, and afterwards a judgment was obtained against the husband. The creditor instituted a suit to set aside the settlement as being voluntary; but Lord Kenyon, M. R., was of opinion that the settlement was good, and that the covenant by the trustees to indemnify the husband against the wife's debts, was a valuable consideration, and therefore that the settlement, though made after the debt to the plaintiff was contracted, was good against him.

\*A deed containing such a covenant has been held [ \*620 ] good against the assignees of the husband who had become a bankrupt. By a settlement executed on marriage, an estate, which was originally the property of the wife, was limited, in default of issue of the bodies of the husband and wife, to the survivor of them in fee. On a separation afterwards taking place between them, the husband covenanted with a trustee to pay his wife an annuity of 70*l.*, and to convey his contingent estate in fee to such person as the wife should by deed or will appoint. The trustee covenanted on his part to indemnify the husband against the wife's debts and against any demand for alimony which she might at any time make. She executed an appointment in favour of the plaintiffs by a deed properly attested. The husband having survived his wife, became a bankrupt and died, when the bill was filed by the plaintiffs as appointees, for a conveyance of the estate agreeably to the husband's covenant, and for an account of the rents and profits since his death. On the part of the assignees it was objected that the covenant was void as against creditors, for want of a sufficient consideration to support it, the husband having been a trader when the deed of separation was executed. But Sir William Grant decreed a specific performance of the covenant as it was grounded on a valuable consideration.<sup>(m)</sup>

A settlement of part of the husband's property in favour of the wife on the occasion of their separation, was sustained against a subsequent purchaser for a valuable consideration. By deed of three parts between husband, wife, and trustees, reciting that differences existed between the husband and wife, and that they had agreed to live separate; that the husband had agreed to allow the wife 100*l.* a year out of certain lands, (for which the ejectment was brought) for her support and maintenance; and that he had agreed to pay certain debts mentioned in a schedule, and also to pay the costs of a suit instituted

(k) *Westmeath v. Westmeath*, Jac. 138.

(l) 2 Br. C. C. 90.

(m) *Worrall v. Jacob*, 3 Mer. Rep. 267,

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(i) *Westmeath v. Westmeath*, 5 Bligh, N. S. 375; *Legard v. Johnson*, 3 Ven. 359; *Seeling v. Crawley*, 2 Vern. 386.

(j) *Logan v. Birkett*, 1 Mylne & K. 225; *Elworthy v. Bird*, 2 Sim. & Sta. 281; see post, p. 633—638.

aration against the husband's creditors, although Lord Eldon, if not bound by positive decisions, thought that it was impossible to show that it ought originally to have made any difference whether there was or was not such a covenant.<sup>(k)</sup> In *Stephens v. Olive*<sup>(l)</sup> the husband was entitled to certain real estates for his life, subject to a mortgage for 500*l.*, and he and his wife agreed to live apart; he therefore conveyed his life estate to trustees; first, to keep down the interest of the mortgage, then to pay taxes, &c.; and finally, an annuity of 35*l.* to the wife for separate maintenance. The trustees covenanted to indemnify the husband against the debts which the wife might contract after the separation. The trustee entered into possession of the premises, and afterwards a judgment was obtained against the husband. The creditor instituted a suit to set aside the settlement as being voluntary; but Lord Kenyon, M. R., was of opinion that the settlement was good, and that the covenant by the trustees to indemnify the husband against the wife's debts, was a valuable consideration, and therefore that the settlement, though made after the debt to the plaintiff was contracted, was good against him.

\*A deed containing such a covenant has been held [ \*620 ] good against the assignees of the husband who had become a bankrupt. By a settlement executed on marriage, an estate, which was originally the property of the wife, was limited, in default of issue of the bodies of the husband and wife, to the survivor of them in fee. On a separation afterwards taking place between them, the husband covenanted with a trustee to pay his wife an annuity of 70*l.*, and to convey his contingent estate in fee to such person as the wife should by deed or will appoint. The trustee covenanted on his part to indemnify the husband against the wife's debts and against any demand for alimony which she might at any time make. She executed an appointment in favour of the plaintiffs by a deed properly attested. The husband having survived his wife, became a bankrupt and died, when the bill was filed by the plaintiffs as appointees, for a conveyance of the estate agreeably to the husband's covenant, and for an account of the rents and profits since his death. On the part of the assignees it was objected that the covenant was void as against creditors, for want of a sufficient consideration to support it, the husband having been a trader when the deed of separation was executed. But Sir William Grant decreed a specific performance of the covenant as it was grounded on a valuable consideration.<sup>(m)</sup>

A settlement of part of the husband's property in favour of the wife on the occasion of their separation, was sustained against a subsequent purchaser for a valuable consideration. By deed of three parts between husband, wife, and trustees, reciting that differences existed between the husband and wife, and that they had agreed to live separate; that the husband had agreed to allow the wife 100*l.* a year out of certain lands, (for which the ejectment was brought) for her support and maintenance; and that he had agreed to pay certain debts mentioned in a schedule, and also to pay the costs of a suit instituted

(k) *Westmeath v. Westmeath*, Jac. 138.

(l) 2 Br. C. C. 90.

(m) *Worrall v. Jacob*, 3 Mer. Rep. 267, 268.



against him in the ecclesiastical court,—it was witnessed that in pursuance of the aforesaid agreement and of five shillings the husband [ \*621 ] conveyed the lands to the trustee, (\*the lessor of the plaintiff) in trust to pay the annuity. The deed then contained a covenant by the husband, that the wife might live separate from him, and a covenant by the trustee that the husband might live separate from the wife, and that she would not sue him for living apart from her or *for any alimony*; but there was no express covenant on the part of the trustee to indemnify the husband against the future debts of his wife. The deed then provided that in consideration of the annuity of 100*l.* thereby made payable to the wife, it was agreed between the parties thereto that the wife should accept the same in full satisfaction for her support and maintenance, and clothing, and all alimony or other demands whatsoever, during their coverture. The trustee covenanted that it should be lawful for the husband to deduct out of the annuity the amount of any debts which the wife might thereafter contract, and which he might be obliged to pay. The deed concluded with an agreement between the parties that, the trustee performing the trusts reposed in him, nothing therein contained should at any time thereafter affect the person or property of the trustee, his executors, &c., but that the trustee, his heirs, &c. should be indemnified against all suits or actions at law or in equity on account of any act which he should lawfully do in the premises, or against any claim, covenant, or condition therein contained, the said trustee being merely a trustee and having no interest or concern in the premises save as aforesaid. The defendant claimed as purchaser for valuable consideration under a deed *subsequently* executed, and his counsel contended that the deed of separation was void upon two grounds; first, as being a conveyance without consideration, and therefore voluntary and void against the defendant, who was a purchaser for valuable consideration; secondly, as being executed under circumstances which the policy of the law did not justify. There having been a verdict for the lessor of the plaintiff, subject to these objections, it was held by Bushe, C. J. that the deed of separation was not voluntary, and, secondly, that it was legal and binding. First, it was not voluntary, for the covenant that the wife should accept and take the annuity in full satisfaction for her support, maintenance, &c., and all alimony, &c. was in [ \*622 ] substance a covenant to indemnify the husband against the debts of the wife, which is a valuable consideration; but that even if it was not in substance such a covenant, yet that the deed contained a covenant by the trustees that the wife should not sue the husband *for any alimony*, which is a sufficient consideration to support the deed under the Irish stat. 10 Car. 1, st. 2, c. 3, against purchasers for valuable consideration; and that such covenant was not rendered nugatory or released by the concluding covenant in the deed, the true construction of which was, that the trustee should be indemnified from all suits on account of any act that *he should lawfully do* in the premises, and also against any claim, covenant, or condition, relating to such act. Secondly, it was legal and binding; separation deeds, such as in the present case, whatever might be suggested against them, if the ques-

tion were *res integra*, being inveterate in the law, and not to be questioned.(n)

Where a trustee undertakes in general terms to indemnify the husband against his wife's debts, and it is the intention of the parties that the trustees should have notice of each demand before an action is commenced against him, the deed should require notice, otherwise it cannot be insisted on.(o)

Although a husband living apart from his wife, and allowing her a separate maintenance, is not liable to pay her debts, yet a covenant of indemnity against the wife's debts is not considered a mere nullity. The covenant may afford an important protection to the husband, because the sufficiency of the maintenance according to the condition and fortune of the parties is held to be a question for the consideration of the jury.(p)

A deed of separation not containing any covenant to indemnify was held void against creditors. In *Fitzer v. Fitzer*(q) the husband had covenanted to pay a separate maintenance to his wife and daughter upon a separation, he afterwards became insolvent, and the bill was filed by the wife and daughter against the husband and his assignee, to whom the insolvent's effects had been assigned under the Insolvent \*Debtor's Act, to have the trust of the deed for [ \*623 ] separate maintenance performed. There was no covenant by a trustee to indemnify the husband against the wife's debts; and Lord Hardwicke held the deed to be fraudulent against the creditors, saying, "this case stands quite naked and abstracted from any cases where there may be a covenant by relations of the wife to indemnify the husband against debts of the wife; but I will not now determine what the construction of even such a deed would be with regard to the husband's creditors."

*Justifiable cause for Separation.*—Although the validity of deeds of separation has been considered to depend upon the covenant by a third party to indemnify the husband against the wife's debts, yet such deeds have been sustained even against creditors on the ground of facts connected with the separation between husband and wife which justified the separation. The right of the wife in consequence of the husband's ill usage to apply to the spiritual court for alimony, was held a sufficient consideration to support a deed against the husband's creditors, making a provision for her, which was executed in order to prevent his ill-using her in future, and to prevent her instituting a suit in the ecclesiastical court, although such deed contained no covenant on the part of the trustees to indemnify the husband against the future debts of the wife.(r) The same principle was acted on in *Hobbs v. Hull*,(s) where the creditors of the husband filed a bill to set aside a settlement made by him of part of his real estate upon his wife and children on the occasion of a separation between him and his wife; and they insisted that it was void, he being indebted at the time of making it. The defence set up by the answer was (which

(n) *Lessee M'Donnell v. Murphy, Fox & Smith* Rep. 279.

(o) *Duffield v. Scott*, 3 T. R. 375.

(p) *Worrall v. Jacob*, 3 Mer. 369; see *Gillb. Eq. R.* 153. post, 642.

(q) 2 Atk. 511.

(r) *Nunn v. Wilmore*, 8 T. R. 521.

(s) 1 Cox, 445; see *Angier v. Angier*,

was fully proved in the cause,) that the husband had before the time of separation lived in a state of adultery, which the defendants contended gave the wife a right to a divorce and alimony, and that the provision by the settlement was only in lieu of the remedy which would be obtained by such proceedings. The master of the rolls said, that if the husband behaved so ill as to entitle the wife to obtain a divorce

[ \*624 ] \*in a spiritual court *a mensa et thoro*, and to have a proper allowance from him; and if the wife, instead of strictly prosecuting that right, meets the husband in the threshold, and says she will accept the maintenance proposed by him without litigation, that it was not such a voluntary act as to be fraudulent against creditors, for that it never could be said to be without consideration. And accordingly his honour dismissed the bill with costs as to all parties, except the husband, and as to him without costs. Lord Eldon, after referring to the above decisions, where deeds had been sustained on the ground of such cruelty as would entitle the wife to a divorce, said, "the difficulty which I feel in acting upon that principle is, that I doubt, under the circumstances, whether we have a right to try the question whether there has or has not been cruelty, or to decide that without the final sentence of the ecclesiastical court.(t)

Sir L. Shadwell, V. C. appears to have acted on the same principle in the following case. By a deed of separation between husband and wife, which recited "that divers unhappy differences had arisen," the husband covenanted with a trustee to pay to his wife during her life a certain annuity, and a proviso was inserted that the husband might deduct expenses for any action brought against him to recover any debts contracted by the wife. The husband and wife lived separate until the death of the husband, when his executors refused to pay the annuity, alleging that all deeds of separation were *prima facie* void, and that there were no circumstances to take this case out of the general rule. The vice chancellor said that he was called upon in fact to decide whether as against the executors the wife could sustain an action at law for the arrears of the annuity. Now, it appeared to him that no circumstances had been stated to induce him to think that the foundation of the deed was such as the court could not enforce. The court could not presume it to be invalid, for it might happen, for aught he knew, that there were circumstances alluded to under the recital that divers unhappy differences and disputes had

[ \*625 ] subsisted and continued to subsist, sufficient to obtain from \*the ecclesiastical court a divorce *a mensa et thoro*. It was impossible for the court to know, what those unhappy differences were; it was enough for it to know that that was a deed not requiring any consideration to support it, and it laid on those who asserted that the policy of the law was against it, to show that the circumstances were such as not to warrant an application to the ecclesiastical court for a separation. He should be sorry to increase the number of cases in which these deeds of separation had been upheld; but it was not for him on that sort of wild statement, without evidence of the real nature of the unhappy differences, to assume that the deed

(t) 5 Bligh, N. S. 379.

was bad in law. In his opinion, therefore, the wife might *prima facie* support her claim under this deed as against mere volunteers.(u)

A bond of submission to arbitration between the trustee of a wife and her husband recited that a suit for separation had been instituted between the husband and wife in Doctors' Commons, and that in order to put an end to the contest about the terms of the separation it had been agreed that all matters should be referred to a third party, and that either of the parties should be at liberty to apply to the court to make the award a rule of court; it was held that such submission might be made a rule of the Court of Common Pleas, under the stat. 9 & 10 Will. 3, c. 15, although it was contended that the matter in dispute between the parties being only the subject of a suit in the ecclesiastical court was not within that statute.(v)

The husband in not barred of his right to a divorce by reason of his having executed a deed of settlement, after knowledge of his wife's adultery, allowing her a separate income.(w)

*Effect of Covenant not to sue for Restitution of Conjugal Rights.*—A covenant is usually inserted in deeds of separation on the part of the husband, "that he will not require, or by any means whatever, either by ecclesiastical censure or by taking out citation, or by commencing or instituting any suit whatever, seek or endeavour to compel the wife to live with him, or to compel any restitution of conjugal rights." We have \*already seen that such a covenant [ \*626 ] is regarded as nugatory in the ecclesiastical courts;(x) which determines whether there has been cruelty or adultery, and if the judge of that court is of opinion that there has not been either, he is compelled by law to oblige them by sentence to live together.(y) How far such a covenant will be enforced in courts of law or equity by prohibition or injunction has been sometimes treated as a matter of doubt.(z) In *Guth v. Guth*,(a) a case of *Booth v. Booth* was stated to have come before Lord Hardwicke upon motion to restrain proceedings of this description by the husband in the spiritual court, but that it was unknown what his lordship had done upon it. In *Fletcher v. Fletcher*,(b) Buller J., who sat for the lord chancellor, said, "that he knew of no instance of the court of chancery interfering by way of injunction to prevent a suit for restitution of conjugal rights in the ecclesiastical court. Whenever this court has interfered it has been in aid of the ecclesiastical courts, and not to restrain its jurisdiction." In *Westmeath v. Westmeath*,(c) where the husband covenanted that his wife might live separate, and that he would not require, or by any manner or means whatever, either by ecclesiastical censures, or by taking out any process, or by commencing or instituting any suit whatever, compel the wife to cohabit or live with him, Lord Eldon said, "one question is, whether such a covenant will bind; and if I should send this case to a court of law, that will be one of the ques-

(u) *Clough v. Lambert*, 3 Jurist, 672, 673.

(v) *Soilleux v. Herbst*, 2 Bos. & P. 444.

(w) *Coode v. Coode*, 1 Curteis, 757, 762, 763.

(x) Ante, pp. 417, 419, 580, 581.

(y) 11 Ves. 532.

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(z) 8 T. R. 546; 2 Cox, 107; 3 Br. C. C. 620; 11 Vesey, 533; see *Butler's case*, 1 Freem. 282.

(a) 3 Br. C. C. 620.

(b) 2 Cox, 99.

(c) Jacob, 126, 136.

tions. None of the cases, I think, touch that either in decision or in principle. But it does not rest there; for if the covenant be a part of the deed, and if reasons of public policy make void that covenant, and if the whole deed is for the same purpose, it will be difficult to support it. If the purpose be general, and be one that is against public policy, I do not see how it can stand. This I say supposing there to be no decision on the point." His lordship afterwards said,<sup>(d)</sup> that he believed it will be found there is one case decided by Lord Apsley, [ \*627 ] when he was lord chancellor, in which \*he enjoined the parties from going on in the ecclesiastical court.

*Husband's Covenant not avoided by Suit for Restitution of conjugal Rights, nor Wife's Adultery.*—A suit instituted by the wife for the restitution of conjugal rights does not destroy the husband's covenant for the payment of an annuity where the covenant is not limited to the period of separation.

By indenture between husband and wife of the first and second parts, and a trustee for the wife, of the third, after reciting that unhappy differences had arisen between the husband and wife, and that they had mutually agreed to live separate, the husband covenanted to pay an annuity of 80*l.* during so much of the wife's life as as he should live, in full satisfaction of her support and maintenance, and of all alimony whatsoever, and that he would not at any time thereafter sue her for the restitution of conjugal rights, and the trustee covenanted that the wife should release her husband's real and personal estate from all claims for jointure, dower or thirds, and that he would indemnify the husband from debts incurred by the wife after separation. It was held that such indenture was valid in law, and that a plea by the husband, "that the wife had instituted a suit in the ecclesiastical court for restitution of conjugal rights, in which cause he had put in an allegation, and certain exhibits charging her with adultery, and that a decree of divorce *a mensa et thoro*, was thereupon pronounced by that court," was no answer to an action by the trustee for arrears of the annuity.

In that case it was said by the court, "It is admitted that a plea alleging the fact of adultery would not be sufficient, neither is the decree of the spiritual court an answer, for it proceeds upon evidence which in this court would not be deemed satisfactory. We cannot therefore even act upon the supposition that adultery has been committed."<sup>(e)</sup>

It has since been decided that the adultery of the wife after separation is no answer to an action on a covenant to pay a trustee a separate maintenance for the wife.<sup>(f)</sup>

[ \*628 ] \*The adultery of the wife subsequent to the agreement for separate maintenance does not preclude her from any relief in a court of equity to which she would be otherwise entitled.<sup>(g)</sup>

*Husband not allowed to defeat Stipulation in Deed of Separation.*—Where husband and wife lived separate under a deed, by which he

<sup>(d)</sup> *Westmeath v. Salisbury*, 5 Bligh, N. Dowl. & R. 11.

S. 356; see *Jacob*, 139, 140; 3 Br. C. C. 620; 2 Cox, 107; *Wilkes v. Wilkes*, 2 Dick. 791.

<sup>(e)</sup> *Jee v. Thurlow*, 2 B. & Cress. 547; 4

<sup>(f)</sup> *Baynon v. Batley*, 8 Bing. 256; 1 M. & Scott, 339.

<sup>(g)</sup> *Seagrave v. Seagrave*, 13 Ves. 439.

stipulated that she should enjoy as her separate property, all effects, &c. which she might acquire, and that he would not do any act to impede the operation of that deed, and the wife having as executrix commenced an action on a promissory note against the defendants, in the names of her husband and herself, and the husband released the debt, which release was pleaded *puis darrien continuance*; the court ordered such plea to be taken off the record, and the release to be given up to be cancelled: the court holding it contrary both to equity and justice, that the husband who had relinquished his marital rights, should be allowed in direct violation of his contract to execute such a release, and thereby defeat the suit commenced by his wife as executrix. No decision was made as to the right of the husband to receive the money when recovered by the action, although it was intimated that he might perhaps be entitled to intercept the money. *(h)*

*Deed granting an Annuity on Separation, does not require Enrolment.*—A deed of separation, in which, after reciting that differences subsisted between the husband and wife, and that they had agreed to live apart, and that the husband had agreed to give to the trustees, for the benefit of the wife, a life annuity for her separate maintenance, it was witnessed that in consideration of 10s. paid by each of the trustees to the husband, and of the covenants thereafter contained, the husband granted to the trustees a life annuity of 200*l.* for the benefit of the wife, and in which there was (amongst other things) a covenant by the trustees to indemnify the husband from the debts of the wife, need not be enrolled under 53 Geo. 3, c. 141, s. 2. *(i)*

*\*Deeds of Separation avoided by Reconciliation.*—As [ \*629 ] condonation supercedes the ground of complaint for adultery or cruelty, in the ecclesiastical court, *(k)* so it is clear that reconciliation after separation supercedes special articles of separation in courts of law and equity. *(l)* Upon grounds of public policy parties are not permitted to make agreements for themselves, to hold good whenever they choose to live separate. So a deed which provides for a *present* separation, and which prospectively looks to the parties living together again, and then to a future separation, cannot be carried into effect, so far as it provides for such future separation, the reconciliation after the first separation putting an end to the provisions of the deed altogether. *(m)* It was held that an agreement for separation was determined by the husband's condonation, in receiving back his wife and sleeping with her, but that an action might be maintained upon it, because he had recognized the validity of the agreement to pay a separate maintenance long subsequent to the alleged condonation. *(n)*

A sentence of divorce in the ecclesiastical court is evidence, though not conclusive, of the non-reconciliation of the parties. *(o)* Living under the same roof, in a state of the highest animosity, cannot amount to reconciliation. *(p)*

*(h)* *Ianell v. Newman*, 4 B. & Ald. 419; C. 619, n.; 11 Ves. 532.  
*Legh v. Legh*, 1 Bos. & Pul. 447.

*(i)* *Carter v. Smith*, 6 Nev. & M. 480.

*(k)* Ante, pp. 445. 448.

*(l)* *Bateman v. Ross*, 1 Dowl. P. C. 245;  
*Fletcher v. Fletcher*, 2 Cox, 105; 3 Bro. C.

*(m)* *Westmeath v. Salisbury*, 5 Bligh, N. S. 367. 375.

*(n)* *Scholey v. Goodman*, 1 Carr. & P. 36.

*(o)* *Bateman v. Ross*, 1 Dow, 235.

*(p)* *Ibid.* 245.

If the agreement between husband and wife be for a mere temporary separation, the husband's offer of cohabitation is a bar to her claim of the separate maintenance for the future.<sup>(q)</sup> But if the agreement be for a permanent separation during the joint lives of the husband and wife, that is, until both of them shall agree to come together again, and that he shall pay her a separate maintenance so long as such separation continues, then no offer on his part to cohabit will prevent her claim to her separate maintenance being enforced by the court.<sup>(r)</sup>

[ \*630 ] The separate maintenance provided for the wife will not be \*determined by their living together again, where it clearly appears by the deed of separation to be the husband's intention to secure the property for the separate use of the wife during her life, in the same manner as he might originally have done on marriage. Defendant gave a bond to A. and B., conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts while living apart from her. By indenture of the same date, between the above parties and the wife, reciting that the defendant and his wife had agreed to live separate during their lives, and that for the wife's maintenance defendant had agreed to assign certain premises, &c. to A. and B., and had given them the annuity bond as above-mentioned; it was witnessed that the defendant assigned the premises, &c. to them in trust for the wife, and he covenanted with A. and B. to live separate from her, and not molest her or interfere with her property; and power was given to her to dispose of the same by will, and to sell the assigned premises, &c. and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment) and also the bond were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided, that if the defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture. There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding the security. It was held, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond and the indenture of even date with it were not really executed with a view of an immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing on the view \*of the [ \*631 ] whole instrument to prevent the Court of King's Bench from giving effect to the clause which provided for a continuance of the trusts, notwithstanding a reconciliation.<sup>(s)</sup> The court proceeded

<sup>(q)</sup> *Whorewood v. Whorewood*, Ch. Cas. *gier v. Angier*, Prec. Ch. 496; *Guth v. Guth*, 250; 1 Ch. Rep. 223; Finch's C. C. 153; 3 Br. C. C. 614.  
<sup>(r)</sup> *Fletcher v. Fletcher*, 2 Cox, R. 102. <sup>(s)</sup> *Wilson v. Mushett*, 3 B. & Adol. 740.

<sup>(r)</sup> *Seeling v. Crawley*, 2 Vern. 386; *An-*

on the intention of the parties apparent upon the deed, that it should not become void by subsequent cohabitation, but remain in force for securing to the wife for her separate use the property settled by the deed.

SECT. II.—OF THE JURISDICTION OF COURTS OF EQUITY IN ENFORCING AGREEMENT FOR SEPARATION BETWEEN HUSBAND AND WIFE.

It may be considered as a general rule that courts of equity will not infringe upon the jurisdiction of the ecclesiastical court by enforcing the performance of a mere personal contract, entered into between husband and wife to live apart. In *Wilkes v. Wilkes*(t) the husband by deed agreed that his wife should live separate from him, but the court refused to carry such agreement into execution on the ground that the subject was not within the province of a court of equity. Strong doubts have been expressed upon the validity of deeds of separation entered into between husband and wife alone, and, consequently, of the jurisdiction of the court to enforce that part of it by which the husband engaged to pay her a separate allowance. The husband and wife being in law but one person, are unable to contract with each other, and with some exceptions(u) the deed of a married woman is a nullity.(v) In *Guth v. Guth*(x) the agreement for separation was effected by a deed poll, by which in consequence of unhappy differences the parties agreed to separate, and the husband agreed to pay to the wife, or her assigns, an annuity for the full maintenance of herself and one of her children during her natural life, and so long as they should keep separate from each other, provided the wife conformed to the conditions \*before mentioned, and in case she contracted any debts without the [ \*632 ] husband's consent, which he should be compelled to pay, then the agreement to be void. The wife having filed a bill by her next friend, against her husband for compelling payment of the arrears as well as the growing payments of the annuity, Lord Alvanley, after great research and examination of the previous cases, considered that he was bound to enforce the agreement, and said, "this is the contract of the husband to maintain the child as well as the wife, and he must abide by it; and so long as she complies with the conditions and keeps the child she must receive the annuity, therefore let it be referred to the master to take an account of what is due for the arrears of the annuity from the date of the receipt, and let the same be paid with the growing payments to her, or to such person as she shall appoint, and the defendant to pay the costs." But Lord Rosslyn refused to enforce a contract between the husband and wife only for a separate maintenance. He said the first is a general question; whether, taking it in the largest extent, a suit in equity is competent

(t) 2 Dick. 791.

(v) Litt. s. 168; 8 T. R. 546; 11 Ves.

(u) See stat. 3 & 4 Will. 4, c. 74, ss. 77, 530, 531.

78.

(x) 3 Br. C. C. 614.



to give effect by the aid of this court to a deed of separation between husband and wife, assuming such articles of separation to have arisen from discordant tempers, without reproach, either on the one side or the other? Can I, under such circumstances, find a case to entitle the wife to a personal decree against the husband? The common law will not entertain a suit upon contract by a wife against her husband. Such a contract is incapable at law of producing any action. The ecclesiastical court, according to the jurisdiction of this country, has exclusive cognizance of the rights and duties arising from the state of marriage. Therefore I am completely at a loss to discover an equity to control the common law and admit a suit between husband and wife upon a personal contract, and supercede the exclusive jurisdiction of the ecclesiastical court by entering into a consideration of it. His lordship said, that upon the general abstract question he had met with no case, except *Guth v. Guth*, to entitle the court to hold such a jurisdiction. Before he decided according to that case, he wished for a further account of it, for his opinion inclined against [ \*633 ] it, but it was unnecessary to decree directly contrary \*to that case, for if the court would decree a separation where the only person to be affected was the husband, it would never do it as against creditors.(y) Lord Eldon, without deciding the point, concurred with all the doubts of Lord Rosslyn upon the case of *Guth v. Guth*, and said that the question had never been put upon the contract of the husband and wife. The court has always put it upon the contract between the husband and the trustee; from the covenant of the trustee to indemnify the husband against her debts; the existence of which covenant ought to have reminded the court, that those who framed these instruments had no idea that the wife herself was bound.(z)

The court refused to interfere in an agreement between a husband and wife, whereby the latter agreed to give up part of her separate property to the husband in consideration of their living separate, although the application came from the wife, who on being examined stated that she wished to give up a portion of her property for the sake of living separate.(a)

*Equity will enforce Payment of Separate Maintenance for Wife.*—Although a court of equity will not in direct terms, decree a separation between husband and wife, yet it will compel the husband to perform his agreement to pay a separate maintenance where the deed is founded on sufficient consideration.(b) Sir Wm. Grant, M. R. said, "It is now settled that the court of chancery will not carry into execution articles of separation between husband and wife. It recognises no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract." It should seem to follow that the court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and trustee is to give efficacy to the agreement between the husband and wife; and it does seem rather strange that the aux-

(y) *Lagard v. Johnson*, 3 Ves. 352.

(z) *St. John v. St. John*, 11 Ves. 532.

(a) *Durand v. Durand*, 2 Cox, 207.

(b) See ante, p. 619.

iliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law. [ \*634 ]

\*It has, however, been held that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of and relate to that unauthorized state of separation, in which the husband and wife have endeavoured to place themselves. His honour therefore only repeated what had been said by Lord Eldon, (c) "if this were *res integra*, untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject." (d)

The court exercises its discretion in enforcing deeds of separation very cautiously, and will not give its assistance until it has seen whether from the circumstances of the case there is or is not a probability of the parties being reconciled. A sentence in the ecclesiastical court for the restitution of conjugal rights is a reason for the court refusing to give its assistance in such a case; and in general if such an agreement is not fit to be enforced, the court will on a cross bill order it to be delivered up, though there may be cases in which no relief will be given to either party. (e)

Specific performance of an agreement for separation between husband and wife has been decreed, although the agreement was made on a compromise of indictments preferred by the wife against the husband and others for assaults on her; two grounds of demurrer were taken, first that the court will not carry into execution articles of separation between husband and wife; 2dly, that the agreement sought to be executed was illegal, because it provided that a nominal fine only should be imposed on the husband, who had been convicted upon an indictment for an assault upon the wife; and because it provided also that indictments, which had been found against workmen and apprentices of the husband for assaults upon the wife, should be discontinued. But the court held as to the first ground, inasmuch as the articles contained an engagement \*on the part of [ \*635 ] the father and brother of the wife, to indemnify the husband from the debts of the wife, in consideration of the husband's stipulation to pay the wife an allowance of 50*l.* a year for her life, there could be no question that the court would enforce that stipulation against the husband. And as to the second point, all the authorities concur that the policy of the law does permit the compromise of indictments for assaults, and such compromises are frequently recommended and approved by the court, and the bill alleged that such was the fact. (f)

An agreement by the wife to waive the further prosecution of an indictment against her husband for an assault, in consideration of his allowing her an annuity by way of separate maintenance, has been

(c) *Lord St. John v. Lady St. John*, 11 Ves. 537.

(d) *Worrall v. Jacob*, 3 Mer. 256.

(e) *Fletcher v. Fletcher*, 2 Cox, 99.

(f) *Elworthy v. Bird*, 2 Sim. & Stu. 379; see 13 Price, 222; 1 McClell. 69. See 1 Russ. on Crimes, 136, 2d ed.

since held to be an illegal contract, though entered into with the sanction of the court in which the indictment is tried; and the wife cannot claim the arrears of the annuity as a debt against her husband, in competition with her husband's creditors. In this case no settlement had been executed by the husband, though he had agreed to do so. (g)

*Agreement with Trustee with no Covenant to indemnify.*—The Court has enforced a separate provision in favour of the wife, secured by a contract between the husband and a third person acting for the wife, although it was not supported by a valuable consideration, as the covenant of her trustee to indemnify the husband against her debts. By a deed of separation between husband and wife, lands were demised by the husband to trustees, in trust to apply the rents in payment of an annuity for the wife's maintenance. In a suit by the trustees against the husband and the tenants of the premises, Lord Nottingham, with the consent of the parties, ordered all the arrears to be paid; and further, that the husband should not molest his wife in her person, nor interfere with any goods which she should acquire. (h) In *Angier v. Angier*, (i) pending a suit by the wife in the ecclesiastical court for \*separation and alimony, the husband by [ \*636 ] articles agreed with a trustee to allow his wife an annuity, and to permit her to live where she thought fit without molestation. The court decreed payment of the arrears of the annuity, although it does not appear that the deed contained any indemnity to the husband against the wife's debts. So where during a separation the husband wrote a letter to the wife's father agreeing to pay to her an annuity quarterly so long as they should continue separate, on the wife's suit to recover the arrears of the allowance, it was decreed accordingly. (k)

In a case in the exchequer it was held that the husband's covenant to pay to the wife's trustees an annuity for her maintenance is binding on the husband, and may be enforced in equity, although there be no covenant on the part of the trustee to indemnify the husband. A general demurrer to a bill for an account of assets and payment of the arrears of the annuity was overruled, the court being of opinion that the case involved a grave question of too great importance to be disposed of on demurrer. Richards, C. B. said, "it was urged that this claim could not be enforced because there was no indemnity given to the husband by the trustee, I cannot consider that circumstance as affecting this question; because if the contract were integrally bad, such an indemnity would not make it good." (l)

In *Westmeath v. Westmeath*, (m) where the husband sought to restrain proceedings at law against him for recovering an annuity, secured to the wife by a deed of separation not containing any covenant to indemnify the husband from her debts, the injunction was refused. Lord Eldon said, "it is impossible to deny that a covenant of this sort is made by parties who are capable of contracting, and it is considered to be sufficient to support the deed against creditors; but if I am asked, how it is possible that objections on grounds of public policy can be removed by these covenants, the only answer is, that if not bound by decisions I should say it was impossible to show

(g) *Gerth v. Earnshaw*, 3 Y. & Coll. 584.

(h) *Turner v. Boteler*, Finch, Ch. Cas. 73.

(i) *Pro. Ch.* 496.

(k) *Head v. Head*, 3 Atk. 547. 551.

(l) *Ross v. Willoughby*, 10 Price, 7.

(m) *Jacob*, 126. 133.

that it ought originally to have made any difference \*whether [ \*637 ] there was or was not such a covenant. But I cannot say that it will not, for if those who have gone before me have thought that it would, I must give to it the same effect which it had upon their judgments, and from what I have heard them say in conversations that I recollect, I think it would have made a material difference with both Lord Kenyon and Lord Thurlow. I remember too conversing on the subject with Lord C. B. Eyre, he said he never would have decided as he had, but for the covenant by the trustees."

The wife however has the same right as any other *cestui que trust* to require her trustee to act in enforcing payment of her separate provision; the trustee cannot determine whether or not the instrument shall be enforced. Where a trustee refused without an indemnity to enforce a bond for an annuity given by a husband upon separation, the court, upon a bill of the wife by her next friend, made a decree for the arrears and growing payments.(n) So where the trustee had burnt a bond, given to him by the husband for securing a weekly sum to the wife, and the bill was filed by the wife by her next friend for an account of the arrears of the weekly payment, it was decreed, upon the admission in the answer that the bond had been burnt, that the plaintiff should be at liberty to bring an action on it at law in the name of the trustee.(o)

*Wife's Rights when affected by Deeds of Separation.*—In a deed executed upon a separation between husband and wife by them and the trustees of their marriage settlement, the wife charged her separate property comprised in the settlement, with the payment of an annuity to the husband, and the husband covenanted to permit the wife, notwithstanding and during the coverture, to receive and enjoy to her own sole and separate use, all the property, estate, and effects to which the wife, or the husband in her right, was or might at any time be entitled. On a bill filed after the wife's decease for payment of the arrears of the annuity, the court held, that the release by the husband of his marital right in the future \*acquired property of the wife, was a good consideration from the husband to sup- [ \*638 ] port the claim to the annuity.(p)

The court of chancery permits a father or a guardian of a female infant to contract before marriage on her part with her intended husband as to her personal estate, because otherwise it would become his property; and as to her jointure, because her benefit and the convenience of families require it. But there is no principle or authority for stating that after marriage a parent or guardian can bind the interest of an infant feme covert by contract with her husband. Therefore where a wife, an infant, being entitled to a present interest in certain personal property, and also to certain other contingent interests, a deed of separation was entered into between herself, her father, and her husband, by which she was to retain her present interest in the property; and it was agreed that the husband should have a certain share in the contingent property, if it should fall into possession; the husband having died before the wife, it was held that the

(n) *Cooke v. Wiggins*, 10 Ves. 191.

(o) *Seagrave v. Seagrave*, 12 Ves. 439.

(p) *Logan v. Birkitt*, 1 My. & Keen, 220.

deed was a nullity as to the wife, on account not only of her infancy but her coverture; and that the contingent interest falling into possession she was entitled by survivorship.(q)

Husband and wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and by a separation deed, containing the usual provisions, the husband agreed to pay to his wife for her maintenance an annuity of 180*l.*, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts and contracts of his wife, and all dower and thirds at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, or against her husband or his present or future estate, real or personal, and an agreement that the wife should make and execute all such acts, deeds and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at [ \*639 ] the common law, or by custom, which she could or might claim or demand into or out of any real or personal estate of her husband. The husband having afterwards died intestate, it was held that the deed did not deprive the wife of her share of her husband's personal estate under the statute of distributions.(r) A proviso in a deed of separation that the wife surviving shall be entitled to her dower and thirds, and of all real and personal estates whereof the husband shall die seised or possessed, was construed not as a covenant to leave her such a portion of the personal estate as she would be entitled to under the statute, had he died intestate, but that she would be in the same situation as if not separate as to dower and thirds, i. e. the actual share by law or custom, not interfering therefore with his testamentary disposition.(s)

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SECT. III.—OF THE HUSBAND'S LIABILITY TO DEBTS CONTRACTED BY THE WIFE.

*In respect of Contracts made by the Wife before Coverture.*—The husband is liable to the debts of his wife, contracted by her before the coverture, and the husband and wife may be jointly sued for such debts during the coverture.(t) But if these debts are not recovered against the husband and wife in her lifetime, the husband cannot be charged for them either at law or in equity(u) after the death of the wife. The husband during the coverture, is liable for all his wife's debts, though he had nothing with her; and on the other hand, though he had a considerable personal estate with her, yet unless he be sued during the coverture, he is not afterwards liable even in equity.(x) But if the wife survive the husband, an action may be

(q) *Slamper v. Barker*, 5 Madd. 157.

(r) *Slatter v. Slatter*, 1 Y. & Coll. 28; see 1 Scott, 82; *Onslow v. Onslow*, 1 Sim. 18.

(s) *Cochran v. Graham*, 19 Ves. 63.

(t) *Fitz. N. B.* 120, F.; 7 T. R. 348.

(u) *F. N. B.* 121, C.; 1 Rol. Abr. 351 (G), pl. 2.

(x) *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 469; *Heard v. Stamford*, 3 P. Wms. 409; *Cas. temp. Talbot*, 173.

maintained against her for the recovery of such debts.(y) In an action against husband and wife for a \*debt contracted [ \*640 ] by her before coverture, they may plead her discharge while a feme sole under the Insolvent Debtor's Act.(s) To a declaration against the husband and wife for a debt due from the wife before coverture the husband's discharge under the insolvent act is a good plea. But it seems that the 72d section of 7 Geo. 4, c. 57,(t) was intended to operate so as to make the separate property of a married woman available to her creditors, and therefore that a replication to the above plea, that the wife had separate property, would be good.(u) A married woman taken in execution together with her husband for a debt due from her before marriage, is not entitled to be discharged, unless it appears that she has no separate property, even although the husband has been discharged under the insolvent act.(v)

*In Respect of Contracts made by the Wife during Cohabitation.*—In general a wife cannot by law bind her husband by a contract, but during their cohabitation a presumption arises from such fact of the husband's assent to contracts made by the wife for necessities suitable to his degree and estate.(x) And it is said that in cases where husband and wife are living together, and there is no reason to suppose any difference between them, the law presumes an authority for her to order proper things for her husband's house and her own clothing, and generally such other things as are fairly within her superintendence.(y) Cohabitation is presumptive evidence of the assent of the husband to the contracts of his wife, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised. But no assent will be implied where a tradesman trusts a married woman to an extent beyond what her station in life requires; in such a case the burden of proving the assent of the husband lies on the party who supplied the goods.(z) Evidence that the articles were \*consumed in the family [ \*641 ] of the husband is only presumptive, and not conclusive (a) evidence of the husband's assent.

If goods are furnished to a married woman, who is living with her husband, it must be taken prima facie that such goods are supplied to her by his authority, and it lies on the husband to show that the goods were supplied under such circumstances as to make him not liable to pay for them.(b) Where the husband and wife are living together, the husband is only liable for his wife's debts on an implied contract, and it does not lie on him to prove having given notice to the plaintiff not to supply the goods to his wife, but for the plaintiff to satisfy the jury that the wife contracted the debt by the authority of her husband.(c) Whenever the husband and wife are living together, and

(y) *Woodman v. Chapman*, 1 Camp. 189.

(s) *Storr v. Lee*, 1 Perry & Dav. 633.

(t) See 1 & 2 Vict. c. 110, s. 101.

(u) *Lockwood v. Satter*, 5 B. & Ad. 313.

See *Miles v. Williams*, 1 P. Wms. 257; *In re M. Williams*, 1 Sch. & Lef. 169.

(v) *Sparkes v. Bell*, 8 B. & C. 1. See *Ex parte Deacon*, 5 B. & Ald. 753; 1 & 2 Vict. c. 110, s. 101.

(z) *Etherington v. Parrott*, 1 Salk. 118;

Ld. Raym. 1006.

(y) *Hardie v. Grant*, 8 Carr. & P. 516.

(s) *Montague v. Benedict*, 3 B. & C. 631.

(t) *Manby v. Scott*, 1 Sid. 121, 126.

(b) *Clifford v. Laton*, 3 Carr. & P. 15.

(c) *Spreadbury v. Chapman*, 8 Carr. & P. 371. See *Atkins v. Curwood*, 7 id. 756.

he provides her with necessaries, the husband is not bound by the contracts of the wife, except where there is reasonable evidence that the wife has made the contract with his consent.(d) But his assent cannot be presumed where he has previously warned the tradesman or the servant employed in his trade not to trust the wife.(e) Where a husband, *not separated* from his wife, makes an allowance to her for the supply of herself and her family with necessaries during his temporary absence, and a tradesman having express notice of that fact supplies the wife with goods, the husband is not liable to pay for them.(f) The general liability of the husband is repelled by circumstances showing that credit was given to her, and it is a question of fact whether a tradesman, who furnishes goods to a wife, gives credit to her or her husband.(g)

A wife has no authority to borrow money to lay out for necessaries.(h) If the wife purchases necessaries, and without the authority [ \*642 ] of the husband *borrow money* to pay for them, \*the husband will not be liable at law for the payment of the money.(i) But an action for money lent to the wife, at the request of the husband, may be maintained.(j) A person who lent the wife money, to pay the doctor's bill for curing her of a foul disease given to her by her husband, was held entitled as standing in the doctor's place to recover in equity the sum advanced against the husband's estate after his death.(k)

If a man permit a woman, living in his house as part of his family, but to whom he is not married, to use his name and pass for his wife, and in that character to contract debts, he is liable to the tradesman who furnishes her with goods, whether he knew the circumstances under which they were living or not.(l) So a man is liable for the necessaries of a woman whom he holds out to the world as his wife, although in fact his former wife was living, for he cannot set up bigamy as a bar to the action.(m)

The implied authority to bind the man, either in the case of a wife or mistress, ceases with his death, although he was abroad.(n)

*Husband's Liability after Separation by Mutual Consent.*—If a husband and wife separate by mutual consent, the husband is liable for the reasonable maintenance of his wife, unless she has a competent provision either from the husband or from some fund of her own; and if she has such provision, it lies on the husband to show it.(o) The separate allowance agreed to be made by the husband must be actually paid, in order to exempt the husband from his liability. By a deed of separation between the husband of the first part, his wife of the second part, and the wife's sister of the third part, the husband covenanted with the trustee to pay the wife during the separation a

(d) *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 28; *Filmer v. Lynn*, 4 Nov. & M. 559; 1 Harr. & Woll. 59.

(e) *Etherington v. Parrott*, 1 Salk. 118.

(f) *Holt v. Brien*, 4 B. & Ald. 252.

(g) *Bentley v. Griffin*, 5 Taunt. 356; *Metcalfe v. Shaw*, 3 Camp. 22. See post, 645, 646.

(h) *Earle v. Peale*, 1 Salk. 367.

(i) *Stone v. Macnair*, 1 Moore, 126; 7 Taunt. 432; 4 Price, 48.

(j) *Stephenson v. Hardy*, 3 Wils. 328; Bl. R. 872; *Stonehouse v. Bodvil*, Sir T. Raym. 67.

(k) *Harris v. Lee*, 1 P. Wms. 482.

(l) *Watson v. Threlkeld*, 2 Esp. 637.

(m) *Robinson v. Nahon*, 1 Camp. 245.

(n) *Blades v. Free*, 9 B. & C. 167.

(o) *Dixon v. Hurrell*, 8 Carr. & P. 717.

weekly allowance, which she agreed to accept in full satisfaction of her maintenance, provided that if the husband should pay any debt, which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly \*allowance until he should be reimbursed; [ \*643 ] the wife, upon the separation, went to live with the trustee, who supplied her with necessaries; the husband having failed to pay the weekly allowance, it was held by three judges that the trustee could maintain an action of assumpsit against the husband for the amount of the necessaries, although the trustee had another remedy by action on the deed. The principle of this decision was thus stated by Heath, J. "It is the duty of the husband to provide necessaries for the wife. The question is, whether he discharges that duty by merely entering into a covenant for payment of an allowance? If he refuse to perform that covenant, the wife may be starved before redress can be obtained. The common law does not relieve any man from an obligation on the mere ground of an agreement to do something else in the place, unless that agreement be performed." Sir J. Mansfield, C. J. expressed an elaborate opinion to the contrary, observing, that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued either in assumpsit or debt for necessaries furnished to his wife.(p) The defendant's liability depends upon the sufficiency of the allowance made to his wife. If that allowance be sufficient, and be regularly paid, the husband is discharged from liability, although the allowance was not settled by deed or writing.(q) But where the husband's defence is a separate maintenance, the wife's receipts are not evidence that the allowance has been paid.(r) Where, on the separation of husband and wife, the husband by deed absolutely transfers to trustees for the wife certain personal property, no longer to be liable to his interference, in an action against the husband for a debt subsequently contracted by the wife, the defendant must show that the trustees gave effect to the deed by taking possession of the property; for if the trustees did not perform their trust and pay the allowance, the wife was left destitute.(s) The \*husband is liable, although he [ \*644 ] make a sufficient allowance on an express promise to [ \*644 ] pay a debt incurred by his wife.(t)

If a married woman be living separate and apart from her husband, it is the duty of tradesmen to inquire under what circumstances the separation took place, before they part with their goods; and if a tradesman do part with his goods to a woman living apart from her husband, the onus lies on him to prove that the separation took place under such circumstances as will entitle him to recover the price of such goods against the husband.(u) In a case where the goods appeared to be ordered by and delivered to the wife of the defendant,

(p) *Nurse v. Craig*, 2 Bos. & P. N. R. 156.

(q) *Hodgkinson v. Fletcher*, 4 Camp. 70.

(r) *Ibid.*

(s) *Barrett v. Booty*, 8 Taunt. 343.

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(t) *Hornbuckle v. Hornbury*, 2 Stark. 177; *Harrison v. Hall*, 1 M. & Rob. 185.

(u) *Clifford v. Laton*, 3 Carr. & P. 15; 1 M. & M. 101.



who was at the time living separate from her husband, no evidence was given of the circumstances or cause of the separation; Lord Tenterden, C. J. nonsuited the plaintiff, and said, when the wife is not living with her husband, there is no presumption that she has authority to bind him even for necessities suitable to her degree in life; it is for the plaintiff to show that under the circumstances of the separation, or from the conduct of the husband, she had such authority.<sup>(v)</sup> When the husband makes a sufficient allowance, the husband is discharged from his liability, without notice of it to the tradesman. In an action for goods supplied to the defendant's wife, who was living separate from him, it appeared that the goods were supplied without the knowledge of the defendant, and evidence was given with a view of showing that the defendant had made an adequate allowance to his wife, and given notice to persons not to trust her. The jury found for the defendant. On a motion for a new trial, on the ground (amongst others) that the notice not to trust the wife had not been proved to have been given to the plaintiff, Alderson, B. said the question does not turn on want of notice, but on the agency of the wife. Did the wife contract the debt by the authority of her husband? If the husband leaves the wife without support, the law says that he gives her authority, within reasonable limits, to pledge his credit for things necessary to her support. If he makes her a reasonable allowance, [ \*645 ] she has no \*authority to contract debts in his name at all. But that the plaintiff had notice of the reasonable allowance is immaterial. He trusts a married woman at his own risk.<sup>(w)</sup> A mere notice by the husband that he will not pay for goods supplied to his wife will not avail him, if, under the circumstances of the separation, he is liable; but if the husband and wife both deal with the same tradesman, and the latter agree with the husband not to charge him for goods to be supplied to the wife, the tradesman cannot afterwards charge the husband for such goods.<sup>(x)</sup>

When the husband and wife have separated and live apart from each other, in consequence of domestic differences, without any articles of separation, the question is, whether the husband has given his wife sufficient provision for necessities suitable to her degree; for if he has, he is not liable to her debts even for necessities. Where the separation took place from some cause which did not imply guilt on either side, but from difference of temper or something of that sort, and the wife had no allowance, except a pension of 50*l.* a year, it was left to the jury to decide whether the articles supplied were more than were reasonable under the circumstances in which the parties were placed at the time, because the wife could only bind the husband to the extent of what was reasonable for her to have under the circumstances of both parties.<sup>(y)</sup> In *assumpsit*, on an agreement to hire a house, which had been made between the plaintiff and the defendant's wife, and for use and occupation of the premises by the defendant's wife, it appeared that the defendant and his wife were separated, she living in Yorkshire and he in London; but that on one occasion he was in her house about a fortnight, and joined in

<sup>(v)</sup> *Mainwaring v. Leslie*, 1 Moody & M. Rawlins v Vandyke, 3 Esp. 250.

18. <sup>(x)</sup> *Dixon v. Hurrell*, 8 Carr. & P. 717.

<sup>(w)</sup> *Mizen v. Pick*, 8 Carr. & P. 373. See <sup>(y)</sup> *Emmett v. Norton*, 8 Carr. & P. 506.

giving a receipt for rent from her lodgers: it was held that, upon the count for use and occupation, the judge ought to have left it to the jury to determine whether the defendant had adopted the contract of his wife.<sup>(2)</sup> Where a wife had in one single instance bought goods, which were delivered at the lodgings of her mother, without her husband's knowledge, but \*for which he subsequently paid: [ \*646 ] it was held, in an action for other goods, also bought by the wife from the same tradesman, and delivered at the lodgings of the mother, but at a different place, that evidence of the facts was proper to be left to the jury, to show an agency in the wife, and a sanction of her dealings by her husband; and the jury having found for the plaintiff, the court refused to disturb the verdict.<sup>(a)</sup> In an action of assumpsit on a contract made by the defendant's wife, for the schooling of two daughters of the defendant for a year; at the trial before Rolfe, B., it appeared that the defendant's wife was living separate from him, but her children were allowed to remain with her. There was no proof of a separate maintenance, nor of the circumstances under which the separation took place. The defence was, that the defendant had given notice to the plaintiff, about the end of the first quarter of the year, that the children were not at her school at his expense, and that the plaintiff had subsequently looked to the defendant's wife for payment. The learned judge told the jury the question was, whether there was any authority given by the defendant to his wife to put the children to the plaintiff's school; that they were to look to what the parties did; and that whether the husband or the wife was in the wrong was not the question. The jury found for the defendant. On a motion for a new trial, on the ground of misdirection, Lord Denman, C. J., said, "Upon looking at the notes of the learned judge, we find that there was distinct notice on the part of the husband that he would not be liable for the schooling of his children by the plaintiff; and that the plaintiff after that went looking to the wife for payment." The rule was refused.<sup>(b)</sup>

*Liability for Contracts after Separation through Husband's Misconduct.*—If a man, without any justifiable cause, turns away his wife, or if, by the indecency or cruelty of his conduct, she is precluded from living with him,<sup>(c)</sup> and he does not give her adequate means of subsistence according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for \*herself.<sup>(d)</sup> But she is not at liberty to run into [ \*647 ] any extravagance, or to pledge his credit for any thing beyond what would be reasonable and necessary for her subsistence.<sup>(e)</sup> A husband, who has turned his wife out of doors without any justifiable cause, cannot exempt himself from liability to necessities for her support, furnished while she was living apart from him, by an advertisement in a newspaper cautioning all persons not to trust her, nor by a particular notice to individuals not to give her credit.<sup>(f)</sup>

(2) *Bernes v. Jarrett*, 2 Jurist, 988.

(a) *Filmer v. Lynn*, 4 Nev. & M. 559; 1 Har. & Woll. 59.

(b) *Bailey v. Calcutt*, 4 Jurist, 699.

(c) *Ante*, 437, 438.

(d) *Aikins v. Curwood*, 7 Carr. & P. 760;

*Lidlow v. Wilmot*, 2 Stark. 86.

(e) *Emmett v. Norton*, 8 Carr. & P. 510.

(f) *Harris v. Morris*, 4 Esp. 41; *Bolton v. Prentice*, 2 Str. 1214; Selw. N. P. 267, 4th ed.

*Husband's Liability where the Wife has eloped or been guilty of Adultery.*—The ground of a husband's liability in an action for goods supplied to his wife, is a supposed authority communicated to her by him; but when she improperly leaves him, that authority is determined.(g) A wife, who is separated from her husband on account of her own misconduct, carries with her no implied authority to bind her husband; as where he has turned her away for adultery (h) or where she has eloped with an adulterer;(i) or even where her husband, who was himself living in adultery with another woman, turned her out of doors, and she afterwards committed adultery (k) nor where she elopes without committing adultery.(l) The verdict in an action for criminal conversation being *inter alias partes*, is not evidence in an action against the husband for necessities supplied to his wife; but if the husband has informed the tradesman that she is living in adultery, he will not be liable beyond necessities, although he does not prove the adultery.(m) Where the wife left the husband without his consent, and during the separation, the husband, who did not allow his wife any maintenance, expressly forbade the plaintiff to deliver any goods to his wife, notwithstanding which, the plaintiff sold to the wife [ \*048 ] silks and velvets, and then brought an action against the husband for the value of the goods; it was ultimately decided, after much argument and difference of opinion, that the husband was not chargeable.(n)

Where the deed of separation making a provision for the wife is void, and she quits her husband's house against his wishes, and continues to live apart from him, although he is willing and wishes to receive her back and to provide for her in his own house, the husband is not liable for goods furnished to the wife who is so living.(o) It was said that a tradesman, merely on the ground of the existence of a valid deed of separation, cannot sue the husband for goods supplied to the wife, living apart from him without his assent, but that the trustees would be bound to obtain the money from the husband, and pay the wife's debts; and that the only remedy of the plaintiff would be to claim payment out of that fund.(p)

Although the husband may be discharged from his obligation to maintain his wife, yet she does not thereby acquire a capacity to make a contract valid against herself.(q) After the husband's death, a wife must be supported by her relations; and it was said that her misconduct in leaving her husband, and committing adultery, would have the same effect.(r)

It may be observed that a husband is entitled to the personal property of his wife, which she has acquired by living apart from him in adultery.(s) A woman, living apart from her husband, acquired a

(g) *Manby v. Scott*, 1 Sid. 109; 1 Keb. 69, &c.; 1 Mod. 194; 1 Bac. Abr. Baron & Feme (H); *Rex v. Flintan*, 1 B. & Ad. 229.

(h) *Hum v. Toovey*, Selw. N. P. 260, 4th ed.

(i) *Morris v. Martin*, Str. 647; *Mainwaring v. Sands*, ib. 706.

(k) *Govier v. Hancock*, 6 T. R. 603.

(l) *Child v. Hardyman*, Str. 875.

(m) *Hurdie v. Grant*, 8 Carr. & P. 512.

(n) *Manby v. Scott*, 1 Lev. 4; 1 Sid. 109; 1 Mod. 124; Bac. Abr. Baron & Feme (H).

(o) *Hindley v. Westmeath*, 6 B. & C. 200.

(p) *Ibid.*

(q) *Marshall v. Rutten*, 8 T. R. 546; *Gilchrist v. Brown*, 4 T. R. 766. See post, sect. 4.

(r) *Rex v. Flintan*, 1 B. & Ad. 230.

(s) *Agar v. Bletchyn*, 2 C., M. & R. 699; 1 Tyr. & G. 160.

sum of money, which she deposited in a bank. She married another man, and on that account the money was vested in trustees for the benefit of herself and her illegitimate children. She was afterwards tried, convicted, and executed for murder. The trustees expended a considerable sum in her defence, and made an application to the bankers for the money so deposited; but it appeared that such application was not made bona fide in execution of the trusts of the settlement. The first husband claimed the \*money, and the parties [ \*649 ] having all been brought into court by an interpleader rule, an issue was directed to try whether he was entitled to it, in which he recovered. The court refused to allow the trustees their costs out of the fund, and directed that the costs of the bankers should be paid by the plaintiff (the husband), to be repaid to him by the trustees. (t)

*Husband's Liability after a Decree of Alimony.*—A husband separated from his wife by a decree *a mensa et thoro* for adultery on his part, is liable to necessities supplied to the wife, if he omit to pay the alimony. (v) A husband is liable for necessities provided for his wife pending a suit in the ecclesiastical court and before alimony decreed, although a decree was afterwards made, directing the alimony to be paid from a date before the time when the necessities were provided for the wife. As where the wife, in March, 1824, instituted a suit in the ecclesiastical court against her husband for cruelty and adultery, and a decree was pronounced in December following that he should pay her 30*l.* per annum *pendente lite*, to commence from the March preceding. On an action for diet and lodging furnished to the defendant's wife from July to November, the husband was held liable. (w) The husband is not liable where he has continued to pay the alimony under a decree by the ecclesiastical court, which had become inoperative, but which could have been renewed without any difficulty. (x) A wife, having sued her husband, in the Consistory Court, obtained a decree against him for alimony. He removed the cause into the Arches Court. The decree then become in law inoperative; but the husband continued making the payments under it; and it was proved that if he had omitted doing so, a new decree could, by a short process, have been obtained from the Arches Court; but that such application was not usually made, unless payment of the alimony were discontinued. It was held that he was not liable in an action for necessities supplied to the wife while the above payments were going on; that such payments could \*not be considered a voluntary [ \*650 ] allowance, and therefore that the Court of King's Bench could not inquire whether or not they were sufficient in proportion to the husband's means. (y)

After a sentence of divorce *ab initio*, the liability of a husband to the debts of his wife does not continue. (z)

*When the Wife has Funds of her own.*—A husband is not liable for necessities furnished to his wife, living apart from him, (there being

(t) *Agar v. Blethyn*, 2 C., M. & R. 699; 1 Tyr. & G. 160.

(v) *Hunt v. De Blaquiere*, 5 Bing. 550; 3 M. & P. 108.

(w) *Keegan v. Smith*, 5 B. & C. 375.

(x) *Wilson v. Smyth*, 1 B. & Ad. 801.

(y) *Wilson v. Smyth*, 1 B. & Ad. 801.

(z) *Anstey v. Manners*, Gow, 10.

no evidence of the cause of separation,) if she has a sufficient separate maintenance, although no part of it is supplied by the husband.(a) In an action against the husband for lodging and necessities supplied to his wife, who lives separately from him, without any fault of her own, and who is possessed of funds of her own, the question is, whether she has such means as are adequate to her support, according to her husband's station in life.(b) A voluntary provision from the crown to the wife during pleasure will not exempt the husband from liability to be sued by his wife's creditors, who have supplied her with necessities.(c)

*What are necessities.*—Necessaries for the wife mean such things as are requisite for her sustenance and protection.(d) The allowance must be sufficient, according to the degree and circumstances of the husband, and the adequacy of the allowance is a question of fact for the jury.(e) Prima facie, the amount of alimony decreed by the ecclesiastical court is evidence of the sufficiency of the sum allowed, the decree in that court being founded on evidence of the situation in life of the parties.(f) Furniture for a house may be considered as necessities, provided it is suitable to the rank and income of the wife.(g) If wearing apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which credit is given to her, and her promissory note is [ \*651 ] taken in payment, the husband is not liable for any part of the goods, and in an action against him for their value, is not bound to prove that the wife was supplied with suitable wearing apparel from any other quarter.(h) An officer in the army, being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid. In an action by a tradesman for goods delivered at the house in which the wife was living, it was held that it was not to be treated as a case of separation, but that the questions for the jury were—1st, Whether the goods supplied were necessities, considering the condition in life of the husband; 2dly, Whether the sum of money settled was sufficient; and, 3dly, Whether it was or was not notorious in the neighbourhood that the wife was living in a style not justified by the rank of her husband; and the jury having found the first question in the negative, and the others in the affirmative, it was held that their verdict must be for the defendant.(i) In assumpsit for goods sold, it appeared that the plaintiff, a jeweller, in the course of two months, delivered articles of jewellery to the defendant's wife amounting in value to 83*l.*; that the defendant was a certificated special pleader, and lived in a ready furnished house, of which the annual rent was 200*l.*; that he kept no man servant; that his wife's fortune upon her marriage was less than 4000*l.*; that she had, at the time of her marriage, jewellery suitable to her condition, and that she had never

(a) *Clifford v. Laton*, 3 Carr. & P. 15; M. & M. 101.

(b) *Liddlow v. Wilmot*, 2 Stark.

(c) *Thompson v. Harvey*, 4 Burr. 2177.

(d) 2 Meea. & W. 265.

(e) *Hodgkinson v. Fletcher*, 4 Camp. 70; *Hunt v. De Blaquiére*, 5 Bing. 562.

(f) *Wilson v. Smyth*, 1 B. & Ad. 804. See ante, p. 592.

(g) *Hunt v. De Blaquiére*, 3 M. & P. 106; 5 Bing. 550.

(h) *Metcalfe v. Shaw*, 3 Camp. 22.

(i) *Dennys v. Sergeant*, 6 C. & P. 419.

worn, in her husband's presence, any articles furnished her by the plaintiff; it appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife, and not for the defendant. It was held that the goods so furnished were not necessities, and that, as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained.<sup>(k)</sup>

If a married lady, who has sufficient clothes, go, contrary to her husband's wish, to a watering place, and go to balls, and for that purpose order dresses, some of them expensive, and [ \*652 ] unsuitable to her husband's circumstances, the husband is not bound to pay for any of them; and in an action for the price of the dresses, it is immaterial whether the plaintiff knew these facts or not, and whether the clothes the lady had before were paid for or not; and the fact that the husband afterwards saw some of the dresses does not vary the case, if it be shown that he disapproved of the conduct of the wife in ordering them.<sup>(l)</sup> In an action of assumpsit for carpets, rugs, &c., supplied to the wife of the defendant; at the trial before Lord Denman, C. J., it appeared that the goods were ordered by the wife of the defendant, who lived apart from him, and were delivered to her at a house in Bolton street, belonging to her uncle; that in the first instance, a bill amounting to 91*l.* 7*s.* 6*d.* including other articles was made out to her; but at her suggestion it was subsequently divided into two, in one of which her uncle was debited, which was paid by him, and in the other, her husband, to the amount of 49*l.*; that the cost of furnishing the house in Bolton street was between 500*l.* and 1000*l.*; that the defendant was a police magistrate, with a salary of 800*l.* per annum, and that before his separation from his wife they lived in a moderate style, kept a carriage, and moved in the highest circles of society. No witnesses were called for the defendant. Two questions were made, whether the articles supplied were necessities, and whether they had been delivered on the credit of the defendant or the defendant's wife, or on the credit of her uncle. The direction of the learned judge to the jury on the first point was, that they should consider whether these articles were necessities for the wife of the defendant, living in a decent and handsome manner, in a state of separation from her husband, without her fault, looking also at the rich and expensive furniture in the house. The jury found a verdict for the defendant. The court refused to grant a new trial, on the ground of misdirection, and held that the question whether the articles in question were necessities, was rightly left to the jury; and that, as to the second point, whether credit was given to the uncle of the defendant's wife, it was incumbent upon the plaintiff to satisfy the jury that credit was given to the defendant. Prima facie the wife deals for her husband; but in this case, of the wife living in a state of [ \*653 ] separation from him, the circumstance of her being in her uncle's house, and the payment of part of the original bill by him, were evi-

(k) *Montague v. Benedict*, 3 B. & C. 631; C. & P. 356. 502.

S. C. nom. *Montague v. Baron*, 5 D. & R. 532; S. C. nom. *Montague v. Espinasse*, 1

(l) *Atkins v. Curwood*, 7 Carr. & P. 756.

dence that she all along dealt for and as the agent of her uncle. The rule was refused.(m)

A tradesman, about to trust a married woman for what are not necessities, and to an extent beyond what her station in life requires, ought in common prudence to inquire of the husband if she has his consent for the order she is giving.(n)

A husband is liable for necessities furnished to his wife suitable to the appearance in life he permits her to assume. But if a tradesman trusts a married woman, deceived by the false appearance she assumes, when by cautious inquiries he might have ascertained her real situation, he cannot come upon the husband beyond the extent to which those inquiries would have shown him to be responsible.(o)

If a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. Lord Ellenborough, C. J., said, "The defendant's liability will depend upon the necessity for exhibiting articles of the peace against him. If that proceeding was uncalled for, his wife could not make him liable for the expense thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required; she had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband for the necessary expense of that proceeding, as much as for necessary food and raiment."(p)

So if a husband separated from his wife, by his violent conduct renders it necessary for her to exhibit articles of the peace against him, he is liable for the expenses thereby incurred, although he allows her a separate maintenance.(q)

[ \*654 ] Where the wife, ill-treated by her husband, indicts him for \*assaulting and imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessities; the court holding it impossible that, under any circumstances, a prosecution of the husband is necessary for the wife within the rule on the subject, inasmuch as if she apprehends ill treatment from him she may exhibit articles of the peace against him.(r)

The reasonable costs of proceedings at law and in equity, instituted by an attorney against the husband on behalf of his wife, who had been forced to leave his house by extreme ill treatment, were recovered in an action on the case against the husband, on the ground that the husband had expressly agreed to pay the bill if reasonable.(s)

A husband, who had separated from his wife, agreed that a deed of separation should be prepared and executed, it was held that the husband was not liable for the expenses of his wife's trustee in procur-

(m) *Harvey v. Norton*, 4 Jurist, 42.

(n) 3 B. & C. 636.

(o) *Waithman v. Wakefield*, 1 Camp. 120.

(p) *Shepherd v. Mackoul* 3 Camp. 326.

(q) *Turner v. Rooks*, 2 Perry & Dav. 294.

(r) *Grindell v. Godmond*, 1 Ad. & Ell. 755.

(s) *Williams v. Fowler*, M'Clel. & Y. 269; see 5 Ad. & Ell. 757.

ing a counterpart to be prepared and executed, in the absence of any promise by him to pay the expenses.(t)

*In respect of Children of the Wife by a former Husband.*—A man who marries a woman having children by a former husband is not bound to maintain them,(v) but if he takes them into his house, and they become part of his family, he will be deemed to stand *in loco parentis*, and be liable in a contract made by his wife for their education.(w)

The father of a bastard child, if he has adopted it as his own, though no order of bastardy has been made on him, is liable for the nursing and necessities furnished for its use.(x)

The court of chancery cannot on account of the misconduct of the wife provide for her children out of her separate property; as the wife cannot be compelled to maintain her children whilst her husband is alive.(y)

\*By the poor law amendment act, 4 & 5 Will. 4, c. 76, [ \*655 ] s. 57, every man who, after the 14th of August, 1834, shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children, and such child or children shall for the purposes of that act be deemed a part of such husband's family accordingly.

The stat. 4 & 5 Will. 4, c. 76, s. 71, enacts that every child which shall be born a bastard after 14th of August, 1834, shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own, right, and such mother, so long as she shall be unmarried or a widow shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother; provided always, that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female.

On the marriage of a widow, having children under the age of sixteen, such children do not acquire the settlement of the second husband by the statute 4 & 5 Will. 4, c. 76, the object of the legislature appearing to be not so much to keep the children with the mother as to make the second husband defray the expense of the maintenance, and for that purpose the children are declared part of the family.(z)

The putative father of a bastard child, born before the passing of the statute 4 & 5 Will. 4, c. 76, whose mother is married to another

(t) *Ladd v. Linn*, 2 Mees. & W. 265.

(v) *Tabb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76.

(w) *Stone v. Carr*, 3 Esp. 1.

(x) *Hesketh v. Gowing*, 5 Esp. 131.

(y) *In re Walker*, 1 Lloyd & G. 328; *Hodgens v. Hodgens*, 11 Bligh, 104—107.

(z) *Re v. Inhabitants of Walthamstow*, 6 Ad. & Ell. 301.



person, is no longer liable on an order of justices for the maintenance of such child ; at least while the husband is competent to do so.(a)

[ \*656 ] \*A woman, settled in the parish of C., bore a bastard child before the passing of statute 4 & 5 Will. 4, c. 76, and it was placed for nurture in the parish of W. She then married, and lived with her husband in the parish of K., the child remaining in W. The child becoming afterwards chargeable to W. while under the age of sixteen, was removed, by order of the justices, to C. It was held that the removal was proper, and consistent with statute 4 & 5 Will. 4, c. 70, s. 57.(b)

Although a father is under a moral obligation to provide necessities for his son, yet the father is not legally liable to pay his son's debts, even for necessities, without some promise express or implied to do so, or in those cases provided for by stat. 43 Eliz. c. 2, when the son is unable to pay them.(c)

It was said by Lord Eldon that if a husband, living in a state of separation from his wife, suffers his children to reside with their mother, he is liable to necessities furnished to the children.(d)

It is a question not yet decided whether a father who deserts his legitimate child be or be not liable in an action of assumpsit to any one who provides food and clothing for it ; but in order that the law should imply a liability on the father to repay another for supporting his child, it is absolutely necessary that desertion of the child by the father should be proved. No such action can be maintained if the father had reasonable ground to suppose that the child was provided for.

Thus where it appeared that the mother left the father and lived in adultery, then a child was born, as to which the father apparently doubted whether it was his, and he was going to put it into the Foundling Hospital, the grandmother, not liking this, sent for the child, and said that the father should be put to no expense ; the child was then put in her custody. Afterwards the mother took it, after which it was sent back again to the grandmother, and then to the mother [ \*657 ] again ; and \*then it returned to the grandmother ; being sent backwards and forwards according to the caprice of the mother. As far as related to the defendant, the father, the child was still in the custody of the grandmother, for he was not proved to have known that she was not in that custody, or that the circumstances of cruelty had occurred. The action was brought by the grandmother against the father for the board, lodging, &c. of the son.(f)

(a) *Lang v. Spicer*, 1 Mee. & W. 129 ; *Law v. Wilkin*, 6 Ad. & Ell. 718 ; 1 N. & Tyr. & Gr. 358. P. 697. See *Mortimer v. Wright*, 6 Mee. & W. 482.

(b) *Reg. v. Inhabitants of Wendron*, 7 Ad. & Ell. 819.

(d) *Rawlins v. Tandyke*, 3 Esp. 252.

(c) *Blackburn v. Mackey*, 1 Carr. & P. 1 ; See ante, 646.

*Fluck v. Tollemache*, ib. 5 ; *Mortimer v. Wright*, Law Journ. 9 vol. N. S. 158 ; 4 Jur. 465. See *Nichols v. Allen*, 3 C. & P. 36 ;

(f) *Urmston v. Newcomen*, 4 Ad. & Ell. 899.

## SECT IV.—OF THE LIABILITY OF THE WIFE'S SEPARATE MAINTENANCE TO DEBTS CONTRACTED BY HER.

*Married Woman not liable to be sued at Law in respect of her separate Property.*—In the courts of common law a married woman can in no way be sued by reason of her having separate property, and living apart from her husband. If a wife who is living apart from her husband has property secured to her separate use, she ought to apply it to her support as her occasions may require; and if those who know her condition, instead of requiring immediate payment give credit to her, they cannot sue her.(a) It has been already stated that a woman divorced *a mensa et thoro* for adultery, and living apart from her husband cannot be sued as a feme sole.(b)

To a plea of coverture the plaintiff replied that the defendant was separated from her husband, that alimony was allowed her by the ecclesiastical court pending a suit there, which was a sufficient maintenance, and that she obtained credit, and made the promises on her own account as a feme sole, and not on the credit of her husband; on demurrer this replication was held to be bad.(c) The court on motion set aside a judgment on a warrant of attorney given by a feme covert, although she had been divorced *a mensa et thoro*.(d) Where a feme covert separated from her husband by a sentence [ \*658 ] of divorce *a mensa et thoro*, was holden to bail while an appeal was still pending against the sentence, the court, on motion, ordered the bail bond to be cancelled, she filing a common appearance.(e)

The husband's residence abroad and *a fortiori* his temporary absence in Ireland or Scotland will not enable the wife to bind herself by her own contracts. In an action for goods sold and delivered the defence was coverture. The defendant's husband was an Englishman, who, about ten years before the commencement of the action, had purchased the appointment of agent for the English packets at the Brill in Holland, and had resided there ever since. During that period he became possessed of madder grounds, from the cultivation of which he derived considerable profit. On the irruption of the French into Holland in 1795, his employment as agent having ceased, he sent his wife, the defendant, with his family to reside in England, but he remained in Holland to look after his madder grounds, and with a view to recover his situation, in case the intercourse between England and Holland should be re-established. The defendant lived in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her with coals, for the value of which the action was brought, but it was decided that it could not be sustained.(f) In an action of trespass by the wife as a feme sole, a plea that the plaintiff was a married woman was put in. The husband in

(a) *Beard v. Webb*, 2 Bos. & P. 93; *Marshall v. Rutton*, 8 T. R. 545; *Murray v. Barlee*, 3 M. & Keen, 220.

(b) *Lewis v. Lee*, 3 B. & C. 291. See ante, p. 477.

(c) *Ellah v. Leigh*, 5 T. R. 679.

(d) *Feithorne v. Blaquiere*, 6 Maule & S. 73.

(e) *Hookham v. Chambers*, 3 B. & B. 92.

(f) *Marsh v. Hutchinson*, 2 Bos. & P. 226. See *Chambers v. Donaldson*, 9 East, 471.

1805 had gone to America, leaving his wife destitute, who had ever since lived separate from him, and made contracts here and obtained credit as a single woman; and for her support had carried on trade as a feme sole. The court decided that the plaintiff could not sustain the action.(g) To a plea of coverture the plaintiff replied, that the defendant's husband "lived and resided in Ireland, and that the defendant lived separate from her husband as a single woman, and as such single woman promised, &c." the replication was held bad on general demurrer, because the terms of it were perfectly consistent [ \*659 ] with mere temporary absence, and they might be \*applied to the case of every man, who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here.(h)

Coverture being pleaded to a declaration in assumpsit for goods sold and delivered, plaintiff replied that defendant was, at the time of the contract, separated from her husband and living in open adultery, that the plaintiff did not know of the marriage or adultery, that the defendant, after her husband's death and before action brought, in consideration of the premises, promised to pay. It was held that no consideration appeared for the promise in the replication, the promise in the declaration being altogether void; and that the replication was a departure, the promise therein being distinct from that alleged in the declaration.(i) As a married woman, living apart from her husband, cannot make a contract for the hire of goods, it was held that the property in the furniture of a house which had been let to her remained in the tradesman who supplied them, as against an execution creditor of the husband.(k)

*When Married Woman will be considered as Feme Sole.*—When the husband is transported or an *alien enemy*, and under an absolute disability to come and live here, the law will make the wife of such a husband chargeable as a feme sole for her debts and contracts.(l) But she is not liable as a feme sole merely because her husband is an alien and continually abroad.(m) A married woman, whose husband has been transported for seven years, may maintain an action as a feme sole on the ground of the husband having abjured the realm, even though the term of transportation has expired, and if the defendant relies on the fact that the husband has returned, by which the right of action in her sole capacity would be gone, the proof of that fact lies on him.(n)

[ \*660 ] \*Where the husband had been attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan of a free-

(g) *Boggett v. Frier*, 11 East, 301.

(h) *Farrer v. Countess of Granard*, 1 Bos. & P. N. R. 80.

(i) *Meyer v. Haworth*, 8 Ad. & Ell. 467.

(k) *Smith v. Sheriff of Middlesex*, 15 East, 607.

(l) *Countess of Portland v. Progers*, 2

Vern. 104; *Derry v. Duchess Mazarine*, Ld. Raym. 147; *Weyland's case*, Co. Litt. 133

a; 2 Bos. & P. 231, 232. See ante, p. 477.

(m) *Barden v. Keverberg*, 2 Mees. & W. 61. See *Kay v. Duchess of Piennes*, 3 Camp. 123.

(n) *Carrol v. Blencowe*, 4 Esp. 27, cited 11 East, 303; Co. Litt. 133 a. *Farrer v. Granard*, 1 Bos. & P. N. R. 80; *Boggett v. Frier*, 11 East, 301; *Marsh v. Hutchinson*, 2 Bos. & P. 226.

man of London, such personal estate was decreed to the wife as to a feme sole.(o)

*Actions by Wife in Husband's Name.*—A feme covert, living apart from her husband under sentence of separation, with alimony allowed *pendente lite* in the ecclesiastical court, having brought trespass in the name of her husband against wrong-doers, for breaking and entering her house and taking her goods, the court refused on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action nor applied to be indemnified against the risk of costs) that the action was brought without his authority.(p) Where husband and wife lived separate, and an action was brought by the wife for a debt due to herself in the name of the husband and wife, without the husband's authority, the court on application ordered proceedings to be stayed until an indemnity was given to the husband. But on giving such indemnity, the wife will be at liberty to go on in her husband's name.(q) So where an action is brought (without the husband's authority) in the name of the husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against costs.(r)

A married woman, in the absence of her husband, will be allowed to sue alone in a testamentary cause in the ecclesiastical court on finding security for costs.(s)

*Separate Estate in Equity liable to Wife's Debts.*—Although a wife cannot at common law be sued in respect of her having a separate property and living apart from her husband, yet such property may be reached in courts of equity \*by means of a suit instituted against her and her trustees.(t) Whenever it is [ \*661 ] sought to charge the separate estate of the wife, the husband must be made a party(u) as a matter of form;(w) but the wife is considered as a feme sole, and must be served with process,(x) and is personally answerable for contempts in not obeying the orders of the court, and may be committed to prison as any other person.(y) Where the husband and wife are defendants in a suit, and lived separate, the husband was allowed, on affidavit of the fact of separation, and that he had no control or influence over her, to put in a separate answer, and an order was made that he should not be liable to process if she neglected to answer.(z)

When personal property is actually given or settled, or is agreed to be given or settled to the *separate use* of a married woman, she

(o) *Newsome v. Bowyer*, 3 P. Wms. 37. See *Belknap's case*, *Weyland's case*, Co. Litt. 133; *Wilmot's case*, Moore's R. 851; *Portland v. Prodgers*, 2 Vern. 104; *Sparrow v. Carruthers*, 2 Bl. R. 1197.

(p) *Chambers v. Donaldson*, 9 East, 470.

(q) *Morgan v. Thomas*, 2 C. & M. 383; 2 Dowl. P. C. 332.

(r) *Harrison v. Almond*, 4 Dowl. P. C. 321; 1 Harr. & Woll. 519.

(s) *Suter v. Christie*, 2 Addams, 150. See 10 Mod. 64.

(t) *Murray v. Barlee*, 3 M. & Keen, 222; 7 Sim. 194; 5 T. R. 682; *Lillia v. Airey*, 1 Ves. jun. 277.

(u) 3 Madd. 374.

(w) 1 Ves. jun. 278.

(x) *Jones v. Harris*, 9 Ves. 486. See *Bushell v. Bushell*, 1 Sim. & Stu. 164; *Owden v. Campbell*, 8 Sim. 551.

(y) *Bell v. Hyde*, Prec. Ch. 330. See 2 Vern. 614, n.; *Carleton v. McEnzie*, 10 Ves. 442.

(z) *Baring v. Cane*, 3 Madd. 472.

may dispose of it as a feme sole to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose.(a) Where a wife joins with her husband in a security, it is by implication an execution of her power to charge her separate property.(b) Freeholds were conveyed by lease and release to trustees to the use of a feme covert, for her separate use for life, or to the use of such person as she should by writing, sealed, &c. appoint; and in default of appointment, in trust to pay the rents to her, for her separate use. The husband and wife, by writing not under seal, for valuable consideration, undertook to execute a mortgage of the property when required. The husband died before any mortgage had been executed, the agreement was binding upon the wife surviving.(c) By a deed, which represented the wife to have the dominion over the fee of an estate by means of a power, the wife appointed and the husband and wife conveyed the fee by way of mortgage. The estate was really settled to the separate use of the wife for life, with remainder to the husband for life, with remainders over. The mortgage money was decreed to be raised out of the life estates.(p)

It is quite clear that a married woman can render her separate estate liable to the payment of debts by an express provision to pay out of her separate estate, as where there was a promissory note given, and also a promise by letter to pay out of her separate estate.(c) There are also several cases in which a feme covert, having separate property, has either in respect of her husband's debt, or what may be called her personal debt, given her bond or note, and the court of chancery has ordered the bond or note to be paid out of her separate estate.(d) Goods purchased by a married woman out of the proceeds of property settled to her sole and separate use, may be taken in execution on a judgment against her husband. The question reserved in this case was, whether the goods bought by the wife, and subsequently taken in execution, should be deemed the property of her trustees, or of the husband. The court thought that they belonged to the husband and not to the trustees, the goods having been bought by the wife with her own money.(g) Where property had been settled on marriage to the sole and separate use of the wife, and she and her husband having afterwards separated, she invested money, saved from her separate estate, in the names of trustees, and appointed it by will, and at her death left an additional sum undisposed of, the husband was entitled to it *jure mariti*.(h)

[ \*662 ] \*It may admit of some doubt whether the liability of the wife's separate estate extends to her general engagements, or is limited to her express contracts in writing. In *Stuart v. Lord Kirkwall*,(e) the separate maintenance settled upon the wife, on a separation from her husband, was 1600*l.* a year. She accepted a bill of exchange drawn upon her by a milliner for 339*l.* 14*s.* 6*d.* and

(a) *Fettiplace v. Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; *Peacock v. Monk*, 2 Ves. sen. 191.

(b) *Hulme v. Tenant*, 1 Br. C. C. 20.

(c) *Stead v. Nelson*, 2 Beav. 245.

(p) *Wainwright v. Hurdisty*, 2 Beav. 222.

*Bullpin v. Clarke*, 17 Ves. 365.

(d) *Norton v. Turwill*, 2 P. Wms. 144; *Standford v. Marshall*, 2 Atk. 69; *Hulme v. Tenant*, 1 Br. C. C. 16; *Heatley v. Thomas*, 15 Ves. 596; *Anon.* 18 Ves. 258.

(g) *Carne v. Brice*, 8 Dowl. P. C. 884.

(k) *Malone v. Kennedy*, 3 Jurist, 793, cited 8 Dowl. P. C. 885.

(e) 3 Madd. 387.

interest, which bill being dishonoured by the wife, a suit was instituted for payment of the debt, not only out of the money then due in the hands of her trustees, in respect of her separate maintenance, but also out of future accruing payments, and for an injunction to restrain the trustees from paying any more of the annuity to the wife. The facts of the case being admitted by the answers, the only question was whether the wife could affect her separate estate by accepting a bill of exchange. Sir John Leach, V. C. decreed according to the prayer of the bill, and said that he had occasion to consider this doctrine in the case of *Greatly v. Noble*,<sup>(f)</sup> and that he then was of opinion that a feme covert, being incapable of contract, the court of chancery could not subject her separate property to general demands; but that as incident to the power of enjoyment of separate property, she had a power to appoint it, and that the court would consider a security executed by her as an appointment pro tanto of her separate estate. Lord Brougham, C. however said, that he could perceive no reason for drawing any such distinction as to the effect of any dealing whereby a general engagement only is raised, that is, where the wife becomes indebted without executing any written instrument, and intimated an opinion that the separate estate of a feme covert is liable in equity to her general engagements as well upon an implied undertaking as by a written obligation. "If (said his lordship) in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting the separate estate, shall only be exercised by a written instrument? Where a married woman, having separate estate and living apart from her husband, employed a solicitor in various transactions, and promised by letters to pay him, [ \*663 ] but without referring to her separate estate, it was held that her separate estate was liable to the payment of the solicitor's bill of costs, a retainer in writing implying a promise to pay whatever should be reasonably and lawfully demanded by the solicitor acting under that retainer.<sup>(g)</sup> Sir L. Shadwell, V. C., who first decided the case in favour of the solicitor, drew a distinction between an express promise to pay by a married woman, which will bind her separate estate, although that estate is not named, and an implied assumpsit, by which that estate is not considered liable to her general debts.<sup>(h)</sup>

It has sometimes been contended that the wife cannot alien by anticipation the funds settled upon her by her husband on a separation, whilst others hold that there is no difference between this case and that of an ordinary limitation of property to her separate use.<sup>(i)</sup> The case of *Hyde v. Price*,<sup>(k)</sup> has been supposed to establish that she cannot dispose of such a provision, except as it becomes due. In that case the husband and wife having agreed to live separate, he executed a deed of separation, in which he covenanted with a trustee to pay a certain allowance for the support and maintenance of his wife during the joint lives of the husband and wife. The wife, whilst living from

(f) 3 Madd. 79.

(g) *Murray v. Barlee*, 3 Mylne & K. 209.

(h) *Murray v. Barlee*, 4 Sim. 91.

(i) 2 Roper on Husband and Wife, 301;

Clancy, 382, 3d ed.

(k) 3 Ves. 437.

her husband, joined with her son in executing a bond and warrant of attorney for securing an annuity to the plaintiff, who filed a bill praying an account of the dividends, in respect of certain bank annuities, which had been vested in the hands of trustees, as the fund for the payment of the maintenance, and that the fund might be transferred to the accountant general, and that what should be found due to the plaintiff, and the future payments from time to time, might be paid out of the dividends and interest of the said stock. Arden, M. R. dismissed the bill so far as it sought payment of the annuity out of the fund during the life of the wife, giving it as his opinion, "that the separate maintenance was not property she was entitled to for her sole [ \*664 ] and \*separate use; that there was a special trust upon it; that she had no dominion over it; that her grant was in defiance of the deed, and therefore could not be enforced in a court of equity." And he said that he was to construe the deed and to say whether the husband did intend that his wife should have dominion over the fund, and that he was clearly of opinion he did not. The power of alienation seems to have been denied in this case on the ground of the deed pointing to a personal enjoyment. Where it is intended that the wife shall not dispose of the interest, an express clause should be inserted that she shall not sell, mortgage, charge, or otherwise dispose of the same in the way of anticipation.<sup>(1)</sup> In the absence of such a restriction, it should seem that there is no difference between separate maintenance and any other separate estate of the wife. In a recent case Lord Abinger, C. B. is reported to have said, "if this were *res integra*, I should say that, unless separate estate arose from circumstances in which separation was not contemplated, it ought not to be made the subject of charge by the wife; and for this reason, that a settlement of property to her separate use before marriage, and a settlement for her separate maintenance after marriage, under a deed of separation, are made with altogether different objects. At law, where the wife has separate property settled upon her before marriage, the maintenance not being the immediate or exclusive object of this provision, he is equally bound to maintain her as if she had no such property. All the obligations to which the wife may expose the husband are as strong in that case as in any other; and proof that she had separate estate would be no answer to an action brought against him on her account. But where, after the marriage, a fund is created, and a covenant entered into for the separate maintenance of the wife, it is nothing more than a declaration by the husband, that though he is bound to maintain her, he means to do so separately. Instead of receiving her in his own house, he says he will maintain her in another, and that he expects her friends will see that he is not burdened with any other debts on her account. Now [ \*665 ] the object of such a \*provision is, in my opinion, simply that of the wife's maintenance, and not that she may be able to raise money upon it. I fear, however, that I cannot act upon this distinction, however just I may deem it, after the cases have gone so great a length in giving effect to deeds of separation." These observations were made in a case where A. by a deed of separation

(1) *Tullett v. Armstrong*, 1 Beavan, 1—33.

covenanted with a trustee that he would pay to his wife or to the trustee, for her separate use, an annuity during the separation; and by the same deed A. assigned leaseholds to the trustee to secure payment of the annuity. A. regularly paid the annuity to his wife, without the intervention of the trustee. Afterwards the wife, on the faith of this separate property, borrowed money of B., who filed his bill against the husband and wife (without making the trustee a party) for payment of his debt out of the annuity. The husband then filed his bill against the trustee and B.; and the wife stating that B. had filed his bill against him, and also that the trustee threatened to distrain for the arrears of the annuity; and praying to be at liberty to pay the arrears into court, and to be indemnified against the costs of B.'s suit: it was held upon demurrer that this bill was not sustainable, either as a bill *quia timet* in regard to the costs of B.'s suit, or as a bill of interpleader; inasmuch as B.'s suit, in its then existing frame, was not sustainable against A.(m)

Although the creditor has a right to proceed against the separate maintenance of the wife, and against the husband as allowing it to her, yet if with a knowledge of her separate allowance he gives her credit beyond its extent, he cannot recover the difference from the husband. Thus where the wife, who was entitled under articles of separation from her husband to 80*l.* per annum, went to lodge with the plaintiff, with whom she continued for eight years, when she became a lunatic, upon which her husband took her away, and placed her in a proper situation at 40*l.* a year. The bill was filed for an account of what was due to the plaintiff for lodging and other necessities, and to have a receiver appointed of the profits of the \*wife's [ \*666 ] separate maintenance, and to be paid her demand out of them with costs, and for an injunction to prevent any conveyance of her estate. The demand of the plaintiff exceeded the amount of the allowance, and the bill was dismissed; the lord chancellor saying, "that upon the question whether the creditor has a right against the separate estate of a wife, and against the husband as allowing it to her; my opinion is, that *prima facie* a creditor has such a right. The question here is whether the plaintiff did not advance to her wantonly; for she appears to have been a very weak woman always. In point of equity, as far as the separate maintenance goes, her creditors have a right to be paid in equity, though in point of law she is not otherwise a *feme sole*. She contracted the debt while in possession of 80*l.* a year. Her husband withdrawing the contract afterwards may be a more difficult point. Her bond will operate as a confession of her debt, supposing her at the time clear enough to confess it, if to no other effect. But it is out of all right to go upon the husband beyond her separate allowance, where the plaintiff knowing she had a separate allowance from her husband, suffered her to run in debt beyond that. She cannot possibly go beyond it. The husband is more a formal party than any thing else, for the plaintiff really goes against the wife in respect of her separate estate."(n)

A trustee for a married woman, having received a notice of a

(m) *Palmer v. Fraser*, 3 Y. & Coll. 491. (n) *Lillia v. Airey*, 1 Ves. jun. 277.



charge executed by her on her separate estate, was held personally liable for payments afterwards made to her; and that notwithstanding the validity of the charge was disputed by her, and no application had been made for an injunction.(o)

[ \*667 ] \*SECT. V.—OF THE WIFE'S REMEDIES AGAINST THE HUSBAND WHEN MOLESTED BY HIM DURING SEPARATION.

*Husband's Authority over his Wife.*—By the law of religion, and the law of this country, the husband is entrusted with authority over his wife.(p) So, generally, the husband has a right to the custody of the person of his wife, but he is not justified in obtaining it by illegal means, as by force.(q) The husband has, however, by law, power over his wife to keep her by force within the bounds of duty.(r) The husband also by the old law might give his wife moderate correction. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causâ regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.*(s) But Blackstone(t) observes, that in the politer reign of Charles the Second, this power of correction began to be doubted,(u) and a wife may now have security of the peace against her husband, or in return a husband against his wife. The coercive power which the husband has over his wife does not extend to confine her; for by the law of England she is entitled to all reasonable liberty if her behaviour be not *very bad*; but where the wife will make an undue use of her liberty either by squandering away the husband's estate, or going into lewd company, the husband, in order to preserve his honour and estate, may lay such a wife under a restraint.(v) It has been said that the husband has in consequence of his marriage a right to the custody of his wife; and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her (x)

[ \*668 ] In a recent case, it was held that the husband, in order to \*prevent his wife from eloping, has a right to confine her in his own dwelling-house, and restrain her from her liberty for an indefinite time, using no cruelty, nor imposing any hardship or unnecessary restraint on his part, and on her's there being no reason from her past conduct to apprehend that she will avail herself of her absence from his control, to injure either his honour or his property. By the return to the writ of *habeas corpus*, which was obtained on behalf of the wife, it appeared that the parties lived together for about three years immediately after their marriage, on terms of apparent affection,

(o) *Hodgson v. Hodgson*, 2 Keen, 704.

(p) 1 Hag. Cons. R. 363.

(q) 10 Ves. 62.

(r) Bac. Abr. Baron and Feme, (B.); Crompt. 28. 136; Hetl. 149.

(s) 1 Bl. Comm. 444. And if the wife be in fear or doubt of her husband, that he will beat or kill her, &c., she may sue a *supplicavit* in Chancery against her husband, to find

sureties that he do not beat her, nor evil intreat her, and for to govern, rule and chastise her reasonably. Fitz. N. B. 238, 239; see ib. 80, F.; see post, p. 671.

(t) 1 Bl. Comm. 445.

(u) 1 Sid. 113, 116; 3 Keb. 433.

(v) *Lister's Case*, 8 Mod. 22; 1 Str. 478.

(x) *Rex v. Mead*, 2 Ken. 279; see 10 Ves. 62.

and had two children; that in May, 1836, without any imputation of immorality, coldness, or cruelty on the part of the husband, the wife withdrew herself and offspring from his house and protection, and had resided away from him against his will for nearly four years, during all or the greater part of which time her place of residence in Ireland and France had been unknown to him. It further appeared that she had been induced to return to this country, and placed in her husband's power by a stratagem only; and that she had repeatedly asserted (and she still avowed the same intention) that whenever she had it in her power she would again run away from him, and that he should never see or hear of her again. But on the other side it appeared that the wife left her husband either with her mother, a widow, who had been living with them, or immediately went to her; that she had resided under her roof, and that there was nothing in the return to justify the slightest imputation on her honour beyond having appeared at masked balls, unprotected by the presence and without the permission of her husband. The court was of opinion that the wife must be restored to her husband, as the restraint imposed upon her arose from her own breach of duty; but that the moment such restraint became unnecessary for keeping her in the path of duty, it would become illegal, and she would be entitled to claim the protection of the court.(y)

The court will not grant a writ of *habeas corpus*, unless there distinctly appears to be some improper restraint on the personal liberty of the party desired to be brought up. \*Therefore the [ \*669 ] court would not grant such a writ to bring up the body of [ \*669 ] a married woman on an affidavit that she was desirous of disposing of her separate property, and that her husband would not admit the necessary parties to see her, and that she was confined by illness, and not likely to live long; nor would they under such circumstances grant a rule to show cause why the necessary parties should not be admitted to see her, for if there be no restraint of personal liberty the matter is only cognizable in a court of equity.(z)

In cases of unreasonable or improper confinement by the husband, the courts will relieve the wife on *habeas corpus*.(a) Where the wife was brought up upon the return of a *habeas corpus*, directed to her mother and uncle, which had issued on her husband's application, it appeared that the wife had been very ill used by her husband, and fled from him to the defendants for security and protection, and swore the peace against him. The court refused to order her to be delivered to her husband, and told her "she was at liberty to go where she thought proper," and offered her the assistance of an officer of the court to secure her from any insult in returning to her friends.(b)

*Husband's Right to control Wife waived by Articles of Separation.*—If the husband, after articles of separation between him and his wife, confine her, she may obtain her liberty by means of a writ of *habeas corpus*.(c) The husband may waive his right to the custody of his

(y) *In re Cochrane*, 4 Jurist, 534.

(z) *Rex v. Middleton*, 1 Chitty's R. 654; see *Case of Hottentot Venus*, 13 East, 195; *Atwood v. Atwood*, Pro. Ch. 419; *Bridg. Ind. Baron and Feine*, 9, s. 264; *Rex v. Turling-*

*ton*, 2 Burr. 1115.

(a) *Lord Ferrers's case*, 1 Burr. 634.

(b) *Gregory's case*, 4 Burr. 1991; see *Lord Ferrers's case*, 1 Burr. 634.

(c) *Lord Vane's case*, 13 East, 172, n.

wife by articles of separation;(d) and his covenant to let her live separate, and not to molest her, will be a renunciation of his marital right to seize her; and his attempting to do so, after entering into such articles, or after a suit instituted by her against him in the spiritual court for a divorce, is a breach of the peace.(e) In *Lister's case*,(f) the husband, during separation from his wife by their mutual agreement, [ \*670 ] seized her by force and \*carried her home, in order to compel her to live with him contrary to the articles entered into upon their agreement to live apart. To regain her freedom, the wife sued out a *habeas corpus*, and the Court of King's Bench gave her liberty on the ground that she and her husband had separated by consent and under articles to live apart. So where the parties were under an agreement to live separate, and the husband seized his wife by force, and confined her eleven days, and he threatened to seize her again, and cause her to be brought home dead or alive, it was held, that there appeared to be a reasonable foundation for requiring sureties of the peace against him.(g) In another case,(h) the husband covenanted never to disturb his wife, nor any person with whom she should live. The separation took place, and he, in order to have an opportunity of seizing her by force, or for some bad purpose, sued out a *habeas corpus* to bring up her body. The court held that the agreement was a formal renunciation by the husband of his marital right either to seize the wife, or to force her to live with him; that any attempt by him to seize her would be a breach of the peace; and that if such an attempt were made on her return home from the court it would be a contempt, and the court told her she was at liberty. So where the husband applied for a *habeas corpus* to bring up the body of his wife, upon a question as to the validity of the return, Buller, J., said, "If this case turn out upon a further investigation to be like that in *Burrow*,(i) I am strongly inclined to think this would be an answer to the writ."(k) Upon a similar application made by the husband for this writ, the answer given upon the return of it was, that the wife being entitled to considerable property to her separate use, she and her husband agreed to live apart under articles of separation, by which, in consideration of 3000*l.*, he was to resign all interest in her property; but that he afterwards seized and confined her. Lord Kenyon said, "that unless the wife had done something notoriously to destroy the articles, it was settled that the husband had renounced all [ \*671 ] right to her, that he had \*no claim after the articles of separation. The court, therefore, told her that she was at liberty, and if she were apprehensive of violence, she might have an officer of the court to protect her.(l)

If a husband, by a deed of separation executed by himself, but not executed by either of the trustees, give his wife license to live where she pleases, he is not justified in entering the house of a third person to reclaim his wife as being improperly harboured there; and the husband, before doing so, should at least have given distinct notice to

(d) *Rex v. Mead*, 2 Ken 280.

(e) See ante, pp. 608—631.

(f) 1 Str. 477; 13 East, 173, n.

(g) *Lord Vane's case*, 13 East, 171, n.

(h) *Rex v. Mead*, 1 Burr. 542.

(i) *Rex v. Mead*.

(k) *Rex v. Winton*, 5 T. R. 91.

(l) *Rex v. Edgar*, Rep. B. R. temp. Lord Hardwicke, by Ridg. 152, n.

the third person, that as far as by law he could he revoked the license. In an action of trespass, with a plea of justification that the defendant entered the plaintiff's house to reclaim his wife, who was wrongfully harboured there, a deed of separation of the defendant and his wife is admissible in evidence, if executed by the defendant, although not executed by either of the trustees.(m)

*Writ of Supplicavit.*—A wife may obtain a *supplicavit* in the court of chancery against her husband for the purpose of compelling him to find sureties not to beat or evil entreat her, *aliter quam causa regiminis et castigationis*.(n) A *supplicavit* is a writ grounded upon the statute 1 Edw. III. c. 16, and directed out of chancery to the sheriff and some justices of the peace in the county, or to one or more justices, without the sheriff, for the taking of the surety of such an one as it is prayed against, that he should keep the peace.(o) By an order of the court of chancery, no *supplicavit* for the good behaviour shall be granted, but upon articles grounded upon the oath of two, at the least, or certificate of any one justice of assize, or two justices of the peace, with affidavit that it is their hands, or by order of chancery, or other of the king's courts.(p) By statute 21 James I. c. 8, s. 1, it is enacted, That all process of the peace or good behaviour, to be granted out of the courts of chancery and King's Bench, or either of them, against any person or persons whatsoever, shall be void, unless such process shall be so granted, upon motion \*first made before the judge or [ \*672 ] judges of the same courts respectively, sitting in open court, and upon declaration in writing, upon their corporal oaths, to be then exhibited unto them, by the parties, which shall desire such process, of the causes for which such process shall be granted or awarded, by or out of any of the said courts respectively, and unless that such motion and declaration be mentioned, to be made upon the back of the writ; the said writings there to be entered and remain of record: and if it shall afterwards appear unto the said courts, or either of them respectively, that the causes expressed in such writing, or any of them, be untrue; then the judge or judges of the said courts, or either of them respectively, may award such costs and damages unto the parties grieved, as they shall think fit, and commit the offender until payment thereof.

Before a *supplicavit* is granted, the party who demands it must make an affidavit before a master in chancery, that he does not pray it out of malice.(q) And upon such affidavit the master will make his warrant, upon which one of the clerks of the office may immediately have a *supplicavit*.(r)

If the offender be ordered to give security for his good behaviour, he must do it with sureties by recognizance before a master, who must be in the commission of the peace. If he beats or assaults the party a second time the court will order the recognizance to be put in suit, and permit the party to recover the penalty, but the recognizance is never enforced but by leave of the court.(s)

(m) *Lewis v. Ponsford*, 8 Car. & P. 687.

(n) Fitz. N. B. 238, 239; ib. 80, F.; ante, p. 667; 13 East, 172, n.

(o) *Terms of the Law, Supplicavit*, Fitz. N. E. 79, G.

(p) *Beames's Orders*, 93.

(q) Fitz. N. B. 79, H.; see *Heyn's case*, 2 Ves. & B. 182; post, p.

(r) *Com. Dig. Chancery*, (4 R.)

(s) *Harrison's Chancery by Newland*, 1 563.

The court can only bind the husband to good behaviour, and not remove the wife from him.(t) The obtaining a *supplicavit* does not justify the wife's elopement, for it is granted on the supposition that they are to live together.(u) In *Head v. Head*(w) a writ of *supplicavit* was issued upon the threat of the husband to take his wife to a madhouse; and it would seem that in all cases where the wife is entitled at law to security against her husband's ill-treatment or [ \*673 ] threats of \*injury to her person, she is equally entitled to the writ of *supplicavit* in chancery when living apart from him under articles of separation, if she has a good reason to be afraid for her own safety; but a reasonable foundation must appear upon the face of the articles filed for the writ of apprehension of serious personal danger, and so it is at law.(x) To ground the writ the articles should not be in general forms, as "*fearing*," "*being threatened*, &c.," but some fact must be shown on which the fear is grounded.(y)

In some cases the writ has been refused, and the party aggrieved directed to apply to the justices of the peace.(z)

A *supplicavit* has often been granted by the court upon articles filed on oath of assault and battery, and that the complainant goes in fear of her life.(a) It has also been granted upon information to the court of ill-behaviour.(b)

Formerly the articles must have been filed on oath, an affirmation was not sufficient.(c) But it is presumed that the rule is now different, since the stat. 9 Geo. IV. c. 32, which allows Quakers and Moravians, when required to give evidence in any case whatsoever, criminal or civil, to make their solemn affirmation or declaration, which is to be of the same force and effect as an oath. By 3 & 4 Will. IV. c. 49, Quakers and Moravians are permitted to make an affirmation or declaration instead of an oath in all cases where an oath is required by law. By 3 & 4 Will. IV. c. 82, a similar provision is made with respect to the religious sect called Separatists.

*Amount of Security required.*—Under a writ of *supplicavit* on articles of the peace exhibited by a wife against her husband, the security is not in the first instance to be to an amount unreasonable with reference to his circumstances, but liberty will be given to apply again in case of a repetition of ill conduct.(d) Sometimes the security is reduced on affidavit that the amount required is too large with [ \*674 ] reference to \*the circumstances of the party.(e) In *Dobbyn's case*(f) the articles exhibited by the wife stated personal ill usage of a very aggravated nature. The lady appeared in court, and being sworn by the register, who read the articles to her, was examined by the lord chancellor as to the truth of them; upon a suggestion of the circumstances of the husband, security

(t) Ambl. 334.

(u) *Head v. Head*, 3 Atk. 293. 447; 1 Ves. sen. 17.

(w) 3 Atk. 548.

(x) See 13 East, 172, n.

(y) *Rex v. Bringloe*, 7 Geo. 2, 1733; MS. 1 Madd. Ch. 11; see 13 East, 174.

(z) *Clavering's case*, 2 P. Wms. 202.

(a) *Dobbyn's case*, 3 Ves. & B. 182.

(b) 2 Vent. 245.

(c) *Ex parte Grumbleton*, 2 Atk. 70; *Rex v. Green*, 1 Str. 527; *Hilton v. Byron*, 12 Mod. 243.

(d) *Tunnicliff's case*, 1 Jac. & W. 348.

(e) Ambl. 64; 2 P. Wms. 203.

(f) 3 Ves. & B. 183.

was required from him in the sum of 1000*l.*, with two sureties of 500*l.* each.

In *Heyn's case*(*g*) the articles exhibited by the wife against the husband stated various acts of ill usage and threats, that being compelled to leave him she instituted a suit then in prosecution in the Consistory Court of London praying a divorce *a mensa et thoro*, and that since the institution of that suit he had made an attempt to take her away by force; that she was in great fear and danger that he would take the first opportunity of doing her some great bodily injury unless restrained by the court, therefore praying that he might be ordered to find sufficient sureties for keeping the peace towards the wife, and alleging that she did not make the complaint through any hatred, malice or ill will towards her husband, but merely for the preservation of her life and person from bodily harm. The husband on his marriage had received a fortune of near 5000*l.* The security required from the husband was, himself in 1000*l.* and two sureties in 300*l.*

*Discharge of Party.*—The court it seems exercises a discretion on the subject of discharging a party, but in general the court of chancery, as well as the Court of Queen's Bench, in the case of articles of the peace, at the end of the year, if nothing new happens, will discharge a party for want of finding sureties.(*h*) Where a party had been imprisoned for \*thirteen months on a *supplicavit*, [ \*675 ] without any fresh threatening or other misbehaviour, the court, on motion after notice, ordered the party to be discharged upon entering into a recognizance before the master, with small bail.(*i*) The court will not discharge a *supplicavit* on an affidavit denying the facts, for it will not try them on affidavit; but on a strong case, showing combination and contrivance, the *supplicavit* will be discharged.(*k*) The court interferes in these cases to prevent mischief and to save life, and therefore would not discharge the writ which had been granted against a party of a turbulent and dangerous spirit, who applied on the ground of vexation, but said that the complaint of vexation came too soon, and that the party must stay till the end of the year and behave himself quietly all that time.(*l*) Where the cause which led to the ill treatment of the wife, upon which a *supplicavit* was granted against the husband, continued to exist, the court refused to discharge the writ.(*m*)

*Surety of Peace.*—A wife may require surety of the peace against her husband on account of his cruelty and ill-treatment, and a husband may obtain it against his wife.(*n*) Surety of the peace ought

(*g*) 2 Ves. & B. 182.

(*h*) *Baynum v. Baynum*, Ambl. 64.

*Writs of Supercedas not to be granted but upon Motion in open court.*—It is enacted by stat. 21 Jas. 1, c. 8, s. 3, that all writs of *supercedas* to be granted by the courts of Chancery and King's Bench shall be void unless granted upon motion in open court, and on such sufficient sureties as shall appear on oath to the court, to be assessed in the subsidy book at 5*l.* lands or 10*l.* goods. And unless it shall also first appear to the court that the process of the peace or

good behaviour is prosecuted against him desiring such *supercedas* bona fide by some party grieved in that court out of which the *supercedas* is desired to be awarded.

(*i*) *Ex parte Grosvenor*, 3 P. Wms. 103.

(*k*) *Ex parte King*, Ambl. 240; 2 Ves. sen. 578.

(*l*) *Clavering's case*, 2 P. Wms. 202.

(*m*) *Ex parte King*, Ambl. 333; 2 Ves. sen. 578.

(*n*) Hawk. P. C. c. 60; 2 Crompt. 118; *Rez v. Bowes*, 1 T. R. 696.

upon a just cause of complaint to be granted by any justice of the peace against any person whomsoever, under the degree of nobility, being of sane memory, whether he be a magistrate or private person, and whether he be of full age or under age. The safest way of proceeding against a peer is by complaint to the court of chancery or Queen's Bench (o) There ought to be a reasonable foundation on the face of the articles to induce a fear of personal danger, before the court will require sureties of the peace. (p) The articles ought to be exhibited in the applicant's neighbourhood that the security may be given there. (q) In a case where the defendants lived at Portsmouth, [ \*676 ] and articles of the peace were \*exhibited against them in the court of King's Bench, it had been the usual practice for defendants in such cases to appear personally and to give surety in court. But it being thought oppressive to bring the defendants such a distance, the court ordered the attachment to be indorsed, that sureties might be taken before the justices in Hampshire, in a stated sum, to be regulated by the discretion of the court; and laid this down as a general rule to be observed in all similar cases for the future. (r)

If the marriage be disputed the court will order the recognizance to be worded so as not to admit the fact. (s) Married women ought not to be bound themselves, but to find security by their friends. (t) And if the wife cannot find sureties she may be committed. (u)

Articles of the peace had been exhibited against the defendant by his wife, process issued thereon to enforce appearance; when he appeared in court with his sureties he tendered affidavits in contradiction of the facts sworn to in the articles, for the purpose of discharging them. But Lord Ellenborough, C. J. said the court were satisfied they could not receive affidavits on the part of the defendant to contradict the truth of the articles exhibited against him. *Le Blanc, J.*, adverted to a case (w) in which it was refused the defendant to controvert the facts, but explanation was allowed of such parts of the articles as were ambiguous. (x) Upon the exhibition of the articles of the peace the court may require bail for such a length of time as may appear necessary, and are not confined to a twelvemonth. But where bail had at first been required for fourteen years, it was afterwards reduced to two, upon its being shown that an information was depending against the defendant on the same account, which must necessarily be determined within that time. (y)

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[ \*677 ]      SECT. VI.—OF THE RIGHT TO THE CUSTODY OF CHILDREN.

*Jurisdiction respecting the Custody of Children.*—The ecclesiasti-

(o) 1 Hawk. P. C. c. 60, s. 3.

(p) *Lord Vane's Case*, 13 East, 172, n.

(q) *Rez v. Waite*, 2 Burr. 780; *Rez v. A. B.*, 2 Lord Keny. 511.

(r) *Rez v. Bomaster*, 1 Bl. R. 233.

(s) *Re v. Bainbridge*, 2 Str. 1231.

t. P. C. c. 60, s. 3.

(u) *Crompt.* 118; see *Burn's Justice*, by Chitty, "Surety of the Peace."

(w) *Rez v. Bringlee*, 7 Geo. 2, temp. Lord Hardwicke.

(x) *Rez v. Doherty*, 13 East, 174; see *Lord Vane's case*, ib. 172, n.

(y) *Rez v. Bowes*, 1 T. R. 696.

cal courts have no authority to determine whether the wife is or is not to have the custody of her children.(a) The jurisdiction as to the care and custody of children belongs exclusively to the courts of common law and equity.

The courts of common law do not possess any of that species of delegated authority that exists in the sovereign as *parens patriæ*, and resides in the court of chancery as representing the sovereign.(b) But the care and protection of infants for the purpose of education belongs exclusively to the court of chancery, although the courts of common law have jurisdiction to protect infants from violence or ill treatment.(c)

*Father entitled to Custody of Children.*—Upon general principles of law, the father is entitled to the custody of his children. If they be of an age to judge for themselves when brought before the court upon habeas corpus, they have a right to determine where they will go; but if they have not arrived at years of discretion, the court is bound to make such order as will place the children in the proper legal custody. In cases of habeas corpus, directed to private persons "to bring up infants," the court is bound *ex debito justitiæ* to set the infant free from any improper restraint; and it seems the court are to judge upon the circumstances of the particular case, and to give their directions accordingly.(d)

In *Blisset's case*(e) it was considered that the court had a discretionary power in assigning the custody of a child brought before the court where the father and mother living separate disagreed about the custody, and the child was not of sufficient age to determine for itself, and there were objections to the father's being trusted with the custody. It seems that when a parent applies to a common law court for a writ of habeas corpus to recover his children, who have been \*taken from him, the court will not grant the writ [ \*678 ] if the lord chancellor has previously interfered in the matter.(f) But notwithstanding a bill had been filed in the court of chancery, whilst the writ of habeas corpus was depending, for the purpose of placing the children and their property under the protection of that court, in which there was no prospect of a speedy decision, the court of King's Bench enforced the legal right of the testamentary guardians by ordering the children, with whose care they were entrusted, to be delivered to them on their application on a writ of habeas corpus.(g) The custody of the father is the proper legal custody; but when there is danger to the infant in entrusting it to the care of the father, the court will not act upon the jurisdiction which they possess. Therefore, if there are well founded apprehensions of the father's acting with extreme harshness or cruelty, or with gross profligacy or immoral conduct, so that the child would be in danger of contamination, the court would not order the child to be delivered

(a) *Greenhill v. Greenhill*, 1 Curteis, 467. See 1 Hugg. Eccl. R. 535.

(b) *De Manneville v. De Manneville*, 10 Ves. 59; *Ex parte Skinner*, 9 Moore, 278.

(c) 2 Bligh, N. S. 136, 137.

(d) 3 Burr. 1436, 1437. Per Lord Mans-

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field.

(e) Lofft, 748. See 9 Moore, 281.

(f) See 1 Dow & Clark, 161; 2 Bligh, N. S. 124.

(g) *Rex v. Isley*, 5 Ad. & Ell. 441.



to him.(h) The court refused to deliver the infant, who wanted but six weeks of fourteen, to the father, of whose design in applying for the custody of his child they had a *bad* opinion, but informed the child that he was at liberty to go where he pleased.(i) A writ of habeas corpus was granted in the first instance to bring up an infant who had absconded from his father, and was detained by a third person without his consent.(j)

*The Father entitled to the exclusive Custody of his Children.*—A father is entitled to the custody of his children, to the exclusion of their mother, although they be within the age of nurture. And when the children are in the custody of the mother, the court will compel her to deliver them into the custody of the father, unless it appear to the court that the child will be improperly restrained or its morals contaminated by being placed in the father's custody. The fact [ \*679 ] \*of the father's having formed an adulterous connection is not of itself sufficient to warrant the court in refusing to enforce his right to the custody of his children.(k) There must be some force or improper restraint on the part of the father to deprive him of his right to the custody of the child, and the court will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper confinement or restraint by the mother, where nothing is shown to prove that the custody of the father is improper.(l) So when a father and his infant child, six years of age, were brought up under a writ of habeas corpus in order that the child might be placed under the care of its mother, the Court of Common Pleas refused to interfere, although the husband and wife had separated in consequence of his cruelty towards her, and the father at the time of the application was confined in gaol, and cohabiting there with another woman, who took the child to him daily.(m)

So, although the father had been divorced from the mother, and it was alleged that the child, though born before the divorce, was not his, yet the court ordered the mother to deliver the child to the father, it not appearing that he intended to abuse his right by sacrificing the child.(n)

The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom, the father being at the time an alien enemy, domiciled in this kingdom; and the mother being an Englishwoman and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such an apprehension.(o) On a petition being afterwards presented to the lord chancellor on behalf of the mother and child, his lordship made an order restraining the father from removing the child, or doing any act for the purpose.

(h) *Rez v. Greenhill*, 5 Nev. & M. 255, 4 Ad. & Ell. 624.  
256; 4 Ad. & Ell. 624.

(i) *Rez v. Smith*, 2 Str. 982. See *Rez v. Delaval*, W. Bl. 410. The parental authority is determined by binding the child an apprentice.

(j) *In Re Pearson*, 4 Moore, 366.

(k) *Rez v. Greenhill*, 6 Nev. & Man. 244;

(l) *Ex parte McClellan*, 1 Dowl. P. C. 81.

(m) *Ex parte Skinner*, 9 Moore, 278.

(n) *Sir W. Murray's case*, cited 5 East, 223.

(o) *Rez v. De Manneville*, 5 East, 221; 1

*Smith*, 356.

of removing it out \*of the jurisdiction of that court, but [ \*680 ] he would not allow the mother to have the possession of it, because she had withdrawn herself from the protection of her husband.(p)

*Provision in Deeds of Separation.*—Deeds of separation sometimes contain a covenant on the part of the husband to resign the children of the marriage, or some of them, to the care of the wife; but Lord Eldon doubted whether a court of law would be justified upon a mere contract by the husband with the wife only in taking from him the custody and control of his children imposed upon him by law.(q) Since that case children have been ordered to be delivered up by their mother to their father on habeas corpus, notwithstanding provisions contained in deeds of separation for their residing with their mother.(r)

\*In a case which came before the court of King's [ \*681 ] Bench, on an application for a habeas corpus in 1781, by the mother, to bring up the body of the child, who had been placed at school, from whence it had been taken by the father; it appeared that there had been articles of separation, by which the father had bound himself to let the mother have access to the child. And then Lord Mansfield said that the court could not take a child from the father. But that, as he had constrained himself by the articles to let the

(p) *De Manneville v. De Manneville*, 10 Ves. 52.

(q) *Lord St. John v. Lady St. John*, 11 Ves. 531.

(r) *Westmeath v. Westmeath*, Jac. 251, 253, note. In this case an application was made by the Earl of Westmeath on the 16th June, 1819, by petition, stating his marriage, and that he had two children, one aged five years and another aged seven months; that he and his wife had been living together in the same house and the children with them until the 14th June, when the wife, without his knowledge or consent, took the care and custody of the children, and sent them from his house, and caused them to be taken to the wife's father, and placed them under the care and protection of the wife; and that she also, without sufficient cause or motive, absented herself and had not returned, though he was willing to receive her and support her and the children; upon this petition the lord chancellor ordered a writ of habeas corpus to issue, returnable immediately, for bringing before him the bodies of the infants; Reg. Lib. A. 1818, fol. 1359.

By the wife's return to the writ it was stated, that she lived separate and apart from her husband; that the infants were not under imprisonment, restraint or duress of any kind, and that they were infants of tender years, and incapable of managing and taking care of themselves; and that she had the care and custody of their persons under the authority of a deed, dated 17th

December, 1817, executed by the husband, their father, and that she paid the costs of their maintenance and education by means of another deed, dated the 30th May, 1818, also executed by the husband; that the infants always had been and then were tenderly and properly nurtured and taken care of by her; and that it was for their benefit and advantage that they should remain in her care and under her custody; and that the said Earl of Westmeath had no place of residence of his own to receive and place the infants in, he being then resident in the house taken by her for her separate use, and under a contract made by her own name with the owner, and paid for by her out of her separate income, and which she had only quitted to avoid altercation with the said earl until she could be restored to the exclusive enjoyment thereof by a court of equity. The deed of the 17th December, 1817, contained a clause by which, in the event of a separation between the earl and countess, the former covenanted to permit their daughter, and such other children as they might have between them, to be and reside with the latter, and to be educated under her care and superintendence. By the deed of December, 1818, a provision was made for the separate maintenance of the countess, and an annual allowance was agreed to be raised and paid to her for the maintenance of the infants. Reg. lib. A. 1818, fol. 1534; Jac. 251, 252, n.

mother's care, access to the child, if he chose to take he child home he must provide for the access of his mother to it hereafter.

There was a writ of habeas corpus issued in France, and was under sentence of transportation. The court granted a writ of habeas corpus in order to produce the mother and custody of her child if he was of the age of fifteen, who was residing with her at a distance.

*Proceeding where the Child had been taken Abroad against the Father's Consent* [Where a writ of habeas corpus has been served on a party in France, and which has not been obeyed, the court of Queen's Bench will not grant a rule absolute in the first instance for an attachment, on the ground of his disobedience, although the English proceeding has been recognized, and ordered to be obeyed by the French tribunals. In this case the defendant had sailed into France with the applicant's wife, with whom he was then living there as a voluntary, and had taken the applicant's son, and for a long time kept him from his father, who, on applying for the restoration of his son, was refused, unless a sum of 1000*l.* was paid for his support. An application was then made for a writ of habeas corpus to bring up the body of the child, and that writ was served personally on the defendant in Paris. An application had been made previously to this service to the French authorities, and the writ of habeas corpus had been recognized and declared proper to be executed. In the service

[1893] of the writ the French forms had been adopted.<sup>(x)</sup> Under these circumstances it was submitted, that the proceeding of the French tribunal would be recognised in this country by the English courts on general principles of international law, and therefore that the court would grant a rule absolute in the first instance for an attachment, on the ground of the defendant's disobedience to the writ of habeas corpus. Patteson, J. said, "The only effect which the proceedings of the French tribunal can have upon the service of the writ of habeas corpus is to render it equivalent to personal service of that writ. The French law cannot give any greater effect than is attached to it by the English law; nor can the law of France give me more authority with respect to my writ than I have without that law. The present case is different from one in which it is sought to give effect to a foreign judgment.<sup>(x)</sup> Here it is sought to give effect to a proceeding commenced in England. I cannot grant a rule absolute in the first instance for an attachment, as the defendant would have a right to be heard before the writ of attachment could go. I can only grant you a rule nisi in the first instance."<sup>(y)</sup> It was then suggested that the court might issue its warrant for disobedience to the writ under the statute 36 Geo. 3, c. 100, s. 2, which makes non-obedience to such writ to be a contempt of court. But Patteson, J. said, "that act only applies to persons confined or restrained of their liberty within England, Wales, Berwick-upon-Tweed, Jersey, Guernsey, Man and Ireland. Here the applicant's child is in no one of those places, I cannot therefore grant a warrant. All I can do is to grant a rule nisi for an attachment for disobedience to the writ

<sup>(x)</sup> *Thomson's case*, cited 3 *Edw.* 282.

<sup>(y)</sup> *Ex parte Baring*, 6 *Dow.* F. C. 311.

<sup>(z)</sup> *Ex parte Wylly*, 4 *Edw.* 2123.

<sup>(x)</sup> See *Hopcraft v. Farmer*, 1 *Eng.* 355.

*Wrightson v. Laidley*, 3 *Dow.* F. C. 128.

<sup>(y)</sup> *Ex parte Wylly*, 3 *Dow.* F. C. 325.

of habeas corpus, or a new writ of habeas corpus." The counsel in the case elected to take the new writ.(z)

*Delivery to Guardian.*—Where the father is dead, and has appointed a legal guardian of his child, the court will order the child to be delivered to such guardian, if it be too \*young to exercise its own judgment.(a) A father appointed two per- [ \*683 ] sons executors of his will, and also guardians of the persons and estates of his children, and requested them, according to their discretion, to cause his children to be brought up and educated; it was held that this appointment gave the guardians the right to the custody of the children, and the court of King's Bench therefore took them out of the custody of the grandfather and grandmother, against whom there was no objection whatever, and who at the desire of the father, had come over from America to take care of them, and directed that they should be given up to the guardians.(b) In *Rex v. Clarkson*,(c) the infant was a marriageable young lady, who lived with her guardian. A man claimed her as his wife; she denied the marriage. The court would not try the marriage by affidavit, and they would not deliver to the man without allowing the marriage. She chose to remain with her guardian, and the court, upon being informed "that the man had a design to seize her," sent a tipstaff home with her to protect her.

*Illegitimate Children.*—A putative father has no right to the custody of an illegitimate child; and if the father after an order of filiation obtain possession of the child from the mother by fraud or force, the court will order the child to be restored to the mother.(d) But it seems that where the father has the custody of the child fairly, the court of King's Bench will not take it from him.(e) The court of King's Bench granted a habeas corpus to bring up the body of a bastard child within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken at one time by fraud and afterwards by force; and this without prejudice to the question of guardianship, belonging to the lord chancellor representing the crown in chancery.(f) In *Strangeways v. Robinson* (g) the court \*gave no opinion upon the grand point [ \*684 ] raised, whether, after the child was out of the age of nurture, the father could claim the custody of the child from the mother.

In a case in the court of chancery, the infants were the natural daughters of the testator, who had bequeathed them considerable fortunes. The master had approved of a guardian of them, and an allowance for their maintenance. Their mother, who was desirous that they should be permitted to reside with her, presented a petition, objecting to the master's report, and praying that it might be reviewed. The lord chancellor confirmed the appointment of the guardian, but directed the master to consider what intercourse between the

(z) S. C. 5 Dowl. P. C. 391. 393.

(a) *Rex v. Johnson*, 1 Stra. 597; 2 Ld. Raym. 1334; cited 3 Burr. 1436.

(b) *Rex v. Isley*, 5 Ad. & Ell. 414; 2 Harr. & Woll. 196; see ante, 678.

(c) 1 Stra. 444; 3 Burr. 1436.

(d) *Rex v. Soper*, 5 T. R. 278; see *New-*

*land v. Osman*, 1 Bott, 466, which decided that the putative father of a bastard child may take him from the parish, and maintain him himself.

(e) *Rex v. Moseley*, 5 East, 224, note.

(f) *Rex v. Hopkins*, 7 East, 579.

(g) 4 Taunt. 437.

infants and the mother should be reasonably provided for in the plan of their maintenance and education under their guardians.(h)

*Jurisdiction of the Court of Chancery in controlling the Father's Right to the Custody of his Children.*—The origin and principle of the jurisdiction exercised by the court of chancery in controlling the legal rights of the father to the care and education of his children, is involved in some obscurity. Some have supposed that it belongs to the sovereign as *parens patriæ*, and then devolves upon the lord chancellor as the representative of the crown in this branch of the royal prerogative.(i) According to the theory of our constitution the sovereign is especially intrusted with the care and protection of all those who by reason of their imbecility, whether arising from infancy or want of sufficient understanding, are incapable of taking care of themselves.(k) The jurisdiction of the lord chancellor as representing the *parens patriæ* to control the authority of parents as well as guardians, (from whatever source it may have originated,) has been exercised for a long period, and is now firmly established by decisions.(l) The court of chancery has unquestionable jurisdiction to appoint guardians [ \*685 ] for infants who are wards of the court to the exclusion of the father.(m) But the court has not exercised that jurisdiction, unless where there was property belonging to the infant to be taken care of by that court, which has no means of acting, except where there is property.(n) There seems to be no case in which the court, where it has taken away from the father the care and custody of the children, has called in aid of their own means the property of the father.(o) The court has authority to control the legal rights of the father, if the welfare of the infant renders its interference necessary. If a father is abroad, or purposes to send his children out of the jurisdiction; if their continuance under his care and custody is likely to prevent them from being brought up in a manner suited to their expectations in life; if he is addicted to habitual drunkenness and blasphemy; if their moral or religious principles are likely to be injured by living with him or under his superintendence; in such circumstances the court has never hesitated to exercise its jurisdiction.

The jurisdiction exercised by the lord chancellor upon an *habeas corpus* is the same as if it were before a common law judge.(p)

*Sort of Cases in which Jurisdiction has been exercised.*—The jurisdiction has been exercised only in cases marked by the broadest features of immorality and irreligion. It has been applied first in the case of a father outlawed in a foreign country, bankrupt in fortune and vicious in character; secondly, where the father was in Newgate, for breach of the peace against his own wife; thirdly, in the case where the father was an habitual drunkard and blasphemer; fourthly, where the father was an avowed atheist, having published a book

(h) *Courtois v. Vincent*, Jac. R. 268, note.

(i) See Harg. Co. Litt. 128, note; 2 Fonb. Eq. 226, 232; 3 Bla. Com. 426, 427; 2 Russ. 29.

(k) Staundf. de Prer. Reg. 33; 2 Inst. 14; 4 Rep. 126; Bac. Abr. Idiots and Lunatics (C); Dyor, 25; 1 Bla. Com. 303; 1 Bligh's N. S. 348; 2 Russ. 20.

2 Bligh's N. S. 130, 131. See Quart.

Rev. No. 77, pp. 183—214.

(m) *Wellesley v. Duke of Beaufort*, 2 Russ. 1; 2 Bligh's N. S. 124; 1 Dow & Clark, 152.

(n) 2 Russ. 20, 21; *Butler v. Freeman*, Ambl. 303.

(o) 2 Russ. 29.

(p) Jac. R. 254, note; see ante, p. 677.

denying a God, and denying the institution of marriage, and acting up to his principles by deserting his wife and living in adultery ; fifthly, in the case of a father, ruined by a most incredible prodigality, bound hand and foot in an adulterous connexion with the wife of another, and perversely inculcating immoral lessons on his children.

\*The court of chancery will interfere to control the parent's authority, on the ground of his being an outlaw [ \*686 ] residing abroad in embarrassed circumstances, and the child having an estate in remainder, and also a present maintenance.

In *Cruise v. Hunter*, (q) the petition stated the entangled state of the father's property, that he was an outlaw and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, as also to a maintenance by the will of his grandfather, and prayed that the father might be restrained from taking him abroad or improperly interfering with his education, (which was then principally directed by his mother, who lived separate from her husband ; ) affidavits were filed on both sides imputing very gross charges to both father and mother. Lord Thurlow, C. threw out that he would not allow the colour of parental authority *to work the ruin of his child*, and afterwards ordered that his father should be restrained from interfering with the management of the child without the consent of two persons, who were to be allowed by both parties to be proper for the purpose. The order made was, that A. and B., undertaking to take on themselves the care and education of the infant, that the infant be placed under their care, that the father be restrained from removing the said infant from the school and situation in which he then was placed, and from carrying him abroad out of the jurisdiction of the court, and from using and employing any means for that purpose.

The court of chancery removed a child from the father, who was in Newgate for cruelty to his wife, with no other settled abode, and the relative swore that he was unfit to have the management of his children. (r) So also on the ground of the father being an avowed atheist and immoral man living in adultery. Thus a petition was presented in the name of the infant plaintiffs, stating the marriage of their father and mother in the year 1811, and that they were the only issue of it ; that about three years ago the father deserted his wife, and had since unlawfully cohabited with another woman ; that thereupon the mother returned to the house of her father with the eldest of the \*infants, and the other was soon afterwards born ; [ \*687 ] that they had since that time been maintained by their mother and her father, and that their mother had lately died. It was then stated that the father avowed himself an atheist, and that since his marriage he had written and published a work in which he blasphemously denied the truth of the Christian revelation, and denied the existence of a God as creator of the universe ; and that since the death of his wife he had demanded that the children should be delivered up to him, and that he intended, if he could, to get possession of their persons, and educate them as he thought proper. Their maternal grandfather had lately transferred 2000*l.* 4 per cents. in the names of trustees, upon trust for them on their attaining twenty one, or marrying with his

(q) Br. C. C. 500, note by Belt.

(r) *Ex parte Warner*, 4 Br. C. C. 10

consent, and in the meantime to apply the dividends for their maintenance and education. Lord Eldon said, "This is a case in which, as the matter appears to me, the father's principles cannot be misunderstood, in which his conduct, which I cannot but consider as highly immoral, has been established in proof, and established as the effect of those principles; conduct nevertheless which he represents to himself and others, not as conduct to be considered as immoral, but to be recommended and observed in practice, and as worthy of approbation."

"I consider this therefore as a case in which the father has demonstrated that he must and does deem it to be matter of duty, which his principles impose upon him to recommend to those, whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life as moral and virtuous, which the law calls upon me to consider as immoral and vicious; conduct which the law animadvertes upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community."

His lordship made an order to restrain the father and his agents from taking possession of the persons of the infants, or intermeddling with them till further order; and it was referred to the master to inquire what would be a proper plan for the maintenance and education of the infants, and also to inquire with whom and under whose care the infants should remain during their minority, or until further order.<sup>(s)</sup>

The court has also appointed a guardian of infants on the ground of the cruelty and ill-treatment of their father,<sup>(t)</sup> and on the ground that the father had become insolvent.<sup>(u)</sup> It was held by the court of chancery, and afterwards by the house of lords, to be a fit case for exercising the jurisdiction of appointing a guardian for infants, being wards of the court, to the exclusion of the father, upon evidence that the father was living in a state of adultery, and had encouraged his children in swearing, keeping low company, &c.<sup>(x)</sup>

*Adultery alone, not a Ground for Interference.*—Some conduct on

(s) *Shelley v. Westbrook*, Jac. R. 266. 268, note.

(t) *Whitfield v. Hales*, 12 Ves. 492.

(u) *Wilcox v. Drake*, 2 Dick. 631.

(x) *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Wellesley v. Wellesley*, 2 Bligh's N. S. 124; 1 Dow & Clark, 152. In this case it was referred to the master to inquire and report to what person or persons, willing (other than the petitioner, the father,) to undertake the same, the custody of the infants, and the care of their maintenance and education should be committed; and the master was ordered to inquire and state what were the said infants' ages, and the nature and amount of their fortunes; and to state on what evidence or ground he should approve of any person or persons to have the care of the said infants' maintenance and education; liberty for all proper parties to attend *aster* thereon; and the master in making inquiries was to have regard to the

fortunes of the infants respectively. And it was ordered, that the father and all other persons be restrained from removing or attempting to remove the said infants or any of them from the care and custody of their aunts without the permission of the court and further order. And the master was ordered to state upon what plan the person or persons to whom upon such inquiry as aforesaid he should report that such care and custody as aforesaid should be committed, propose to conduct and carry on the education of the said infants respectively; and what sum and sums of money were proposed to be or could be allowed and applied for their maintenance and education out of their fortunes; and that he report his opinion upon such plan and proposal for maintenance and education; and thereupon such further order shall be made as shall be just. *Wellesley v. Duke of Beaufort*, 2 Russ. Rep. 43, 44.

the part of the father, with reference to the management and education of the child, must be shown to warrant the interference of a court of equity with his legal right to the custody of the child. The court has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject proceed upon that distinction, where adultery is the ground of a petition for depriving the father of his common law right over the custody of the children.(y) In [ \*689 ] *Ball v. Ball*(z) a petition was presented by the mother and her daughter, a child about fourteen years of age, praying that the daughter might be placed under the mother's care, she offering to maintain her at her own expense; or that the mother might be permitted to have access to her daughter at all convenient times. The father was living in habitual adultery with another woman, on account of which the mother had obtained a divorce in the ecclesiastical court. Sir A. Hart, V. C. thought that he had no authority to interfere, for some conduct on the part of the father, with reference to the management and education of the child, must be shown to warrant an interference with his legal right; and in this case there did not appear to be sufficient to deprive the father of his common law right to the care and custody of his child.

*Drunkenness.*—The court of chancery will remove a child from the father on the ground of his constant habit of drunkenness and blasphemy, poisoning the mind of the infant.(a) Lord Eldon stated that he had no difficulty in saying, "that if a father be living in a state of habitual drunkenness, incapacitating himself from taking care of his children's education, he is not to be looked upon as a man of such reason and understanding as to enable him to discharge the duty of a parent; and if a case were to occur again, as it had occurred before, the court would take care that the children should not be under the control of a person who so debased himself, and so likely to injure them."(b)

*Where Infant Wards will be allowed to be taken Abroad.*—Notwithstanding the acknowledged legal right of a parent to the custody of his children, the court of chancery having the property of infants under its care, will not suffer the father, who is abroad, to interfere with respect to the infants, because it cannot make him responsible for his conduct towards them; and it has always been the principle of the court not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being [ \*690 ] done.(c) The father of infant wards has in some cases [ \*690 ] been restrained by the court from taking them abroad.(d) But on the petition of an infant ward of the court of the age of eighteen years, praying that he might be permitted to go abroad for three weeks in company with a gentleman to visit his father, leave was granted on

(y) See 2 Russ. 30.  
(z) 2 Sim. 35; see *Greenhill v. Greenhill*, 6 Nev. & M. 245; 4 Ad. & El. 624, where another obstacle to the intervention of the court in favour of the children was the want of a fund applicable to their maintenance.

(a) 10 Ves. 61.  
(b) 2 Russ. 30.  
(c) 2 Russ. 18.  
(d) Anon. Jac. 265, note; *De Manneville v. De Manneville*, 10 Ves. 32; ante 679; *Mountstuart v. Mountstuart*, 6 Ves. 363.



satisfactory security being given that he would be brought home within that time.(e)

The court will not make an order permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in case of imperative necessity; as where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health. Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required.(f) Where ill health required the removal, the court made an order for the master to approve of a plan for the infant's maintenance and education out of the jurisdiction, but the allowance to be limited to one year.(g) The court allowed an infant, with the view of his being in his native country, near to his father and sisters, to be placed at the University in Dublin, upon security for bringing him within the jurisdiction when required.(h)

The court has authority to order maintenance for infants out of the jurisdiction, if the circumstances of the case require it; and where an infant had been taken by his father, who had absconded to America without having surrendered to a commission of bankruptcy, and the father would not suffer the infant to return to England, the court upon appeal gave liberty to the guardian to apply annually for an allowance for the infant's maintenance and education in America, on condition of producing certificates showing the proper application of the money.(i)

[ \*691 ] *\*Religious Tenets when a Ground of Interference.*—The court will not interfere on the ground of religious tenets, except so far as the law of the country looks upon some religious opinions as dangerous to society.(k) Formerly the court would remove children from Roman Catholic guardians or parents,(l) but it is now otherwise. The court refused to take children from the father on the ground of his being a Catholic.(m)

*Testamentary Guardians.*—We have already seen that power is given by statute to the father of appointing guardians for his children.(n) The guardians so appointed are subject to the same jurisdiction, both at law and in equity, as is exercised with respect to the father himself.(o)

Where a suit is instituted for the administration of an infant's estate, the court has jurisdiction over the infant, and on the petition of the guardians may order the infant to be delivered by the mother, whose character was objectionable, to the guardians.(p)

Where the father has appointed a guardian of his children, the

(e) *Biggs v. Terry*, 1 M. & Craig, 675.

(f) *Campbell v. Mackay*, 2 M. & Craig, 31.

(g) *Wyndham v. Lord Ennismore*, 1 Keen, 467.

(h) *Latham v. Hall*, 7 Sim. 141.

(i) *Stephens v. James*, 1 M. & Keen, 627.

(k) *Lyons v. Blenkin*, Jac. Rep. 253. 256.

(l) 2 Br. C. C. 510; *Teynham v. Lennard*, Br. P. C. 302, 2d ed.; see 2 Russ. 22; 1

Ball & B. 61.

(m) *Gallini v. Gallini*, cited 2 Sim. 37; see Anon. Jac. R. 264, note.

(n) Ante, 305. 309.

(o) *Beaufort v. Bertie*, 1 P. Wms. 703; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 115; *Wellesley v. Duke of Beaufort*, 2 Russ. 21; *Rez v. Isley*, 5 Ad. & El. 441.

(p) *Wright v. Naylor*, 5 Madd. 77.

mother has no right as such, to their custody; but the court, with the view of promoting the benefit of the infant, and upon sufficient reason, as the infant's health, will, in the exercise of its discretion, interfere with the right of the testamentary guardian, to the extent of allowing an infant under *eight* years of age to reside with the mother, more especially when the father, by a deed of separation, had covenanted to allow such child to reside with the mother up to the age of *ten* years.(i)

A testamentary guardian cannot by deed or will transfer the custody of his ward to another.(g) On the death of the guardian the office does not pass to his executor or administrator, but is absolutely determined.(r) Where a woman, who is a guardian, marries, the guardianship is not transferred to her husband.(s) A mother having children by a second marriage is not thereby rendered incompetent to be guardian to the children of her first marriage.(t) A testator by his will expressly excluded his wife from the guardianship of his children, and directed that if she should obtain possession of them, the provision he had made for their maintenance should cease, and he appointed his executors to be their guardians. After the testator's death his widow, as the \*answer alleged, forcibly removed [ \*602 ] one of the daughters from a school at which her father had placed her in his lifetime, and took the child abroad. She then filed a bill as next friend of the children, against the executors for an account of the testator's estate. The court of chancery directed the account to be taken, but referred it to the master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed till the report was made.(u)

*Jurisdiction to control parental Authority on the ground of the pecuniary Interest of the Child.*—Where some immediate irrevocable provision has been made for a child, the court has interfered in some cases in taking the custody of children from the father, for the purpose of insuring the education of the child in a manner suitable to its future property.(x) The court will not permit a parent, who cannot educate a child in a manner suitable to the property which the child derives from the bounty of another, to withhold from it the education to which it is entitled. This jurisdiction however is very carefully exercised, not on writ of habeas corpus, but on petition.(y) In *Lyons v. Blenkins*,(z) the grandmother, with whom her grand-daughters had resided, by her will gave a moiety of one estate and some other estates and pecuniary legacies to her three grand-daughters, and taking it for granted that she had power to appoint a guardian, expressly directed that their aunt should be their guardian, with power to receive the rents and interest of their property, and to apply such part as to her should seem reasonable towards their maintenance and education during their minorities. The property of the infants amounted together to about 600*l.* per annum. After the death of the testatrix the infants resided under the care of their aunt. On a petition being pro-

(i) *Doyle v. Wright*, 4 Jurist, 380.

(g) *Vaugh.* 179; *Villareal v. Mellish*, 2 Swanst. 533.

(r) *Vaugh.* 180, 182, 185.

(s) *Com. Dig. Guardian*, (E.) 2.

(t) *Corbet v. Tottenham*, 1 Ball & B. 66;

see ante, 309.

(u) *Arnott v. Bleasdale*, 4 Sim. 387.

(x) *Powell v. Cleaver*, 2 Br. C. C. 499.

(y) *Lyons v. Blenkins*, Jac. R. 254.

(z) *Jac. R.* 245.

sented by the father, praying for the infants to be restored to him, Lord Eldon, C. said, "The view I have taken of the case is of this [ \*693 ] sort; here is a fund provided for the maintenance and education \*of these children; and I think I am properly warranted by authorities in asserting, that if a testator thinks fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period makes a further provision for them, and the father permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education which he himself cannot afford to give them, he is not (unless I greatly mistake the matter,) according to the principles of this court, at liberty to say that he will take them from the course of education which they had hitherto pursued, and that too at a period approaching to maturity of age. He is not at liberty to say I will alter the course of education of my children, by applying more scanty means for the purpose; and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had; and in consequence of which their views in life are very different from what they would have been without it." The father's application was refused, and a reference was directed to the master to inquire by whom and at what expense the infants had hitherto been maintained and educated, and whether the father was of sufficient ability to educate them in as beneficial a manner; and if not, to approve of a scheme for their education during their minorities.(a)

In another case the testator by his will gave 10,000*l.* to trustees upon certain trusts for the infant plaintiff, his grand-daughter, and on trust to pay out of the interest of it an annuity of 100*l.* to her father till she should attain twenty-one or marry with consent of the trustees; and he gave and committed, so far as it was in his power so to do, the guardianship, custody, care, tuition, management and education of the plaintiff to the trustees and the survivors and survivor of them; and he gave to her father a legacy of 2000*l.* By a codicil he declared that if the father or his wife should ever interfere with the management and direction of the trustees respecting the education of [ \*694 ] his grand-daughter, then he \*revoked the legacies left to him, as it was his wish that he should not have any control over her. The father by his answer submitted, that the condition or prohibition annexed to the legacy to him was for want of a bequest over to be considered as *in terrorem* only and void. He was desirous of having the care of his daughter, and submitted that she ought to be placed under his care. The decree directed a transfer of the legacy of 10,000*l.* and on the father undertaking to give up and abandon all interference with the management and direction of the trustees in the education and management of the plaintiff, such undertaking to be given in the manner and form approved by the master, it was declared that he would be entitled to the benefits given to him by the will; but in case he should refuse to give such undertaking, then it was declared that he was not entitled to them; and it was declared, that in the event of his giving such undertaking, the trustees

(a) Jac. R. 255, 256.

were entitled to the guardianship, custody or tuition and management of the plaintiff during her minority; and in that case the master was to approve of a proper scheme for the education and bringing up of the plaintiff according to the meaning and intention of the testator as expressed in his will, regard being had to her rank and expectations in life.(b)

A rich uncle took his three nieces into his house, maintained them there, and died, having bequeathed to them by his will large legacies. The executor continued to keep the nieces in the house where he and the testator lived. The father of the children petitioned that they might be delivered to him. The eldest child (of the age of thirteen) appeared in court, and being examined denied she was under any force; and although she had all imaginable duty for her father and mother, yet she thought herself under an obligation to observe her uncle's intention to continue in the house where he had placed her. The court was of opinion that the guardianship of the children by the law of nature belonged to the father, but that the right thereto was not to be determined upon petition without a bill; and that the father might take his children, but not by force, nor in going to [ \*605 ] or \*returning from the court; and directed the executor who had the custody of the children to permit their parents at all reasonable times to have access to and see their children.(c)

An infant had been delivered by her father and mother to the sole care of the settlor, who made a settlement on the infant, on condition of her being under the care of the settlor; on a bill filed by the infant after her father's death, stating that no person was properly authorised to take care of her person during her minority, and that she was desirous that the settlor should be appointed guardian of her person, it was referred to the master to consider whether it would be proper to appoint the settlor to be guardian of the infant, taking into consideration the effect of the settlement. In this case the infant's mother was living, but resided abroad.(d) The court of chancery will not interfere as to the religious education of an infant upon any supposed pecuniary advantages to be derived from a change of faith, against the father's injunctions.(k)

*Courts of Equity authorised to order Maintenance of Infants.*—The courts of chancery and exchequer in England and Ireland may, by order made on the petition of the guardian of any infant, in whose name any stock shall be standing, or any sum of money by virtue of any act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order in any cause depending in such courts, direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person according to the discretion of such court for the maintenance and education, or otherwise for the benefit of such infant; such guardian or other person, to whom such payment shall be directed to be

(b) *Colston v. Morris*, 28 May, 1819; Jac. R. 257. 258, note.

(c) *Ex parte Hopkins*, 3 P. Wms. 152.

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(d) *Fagnoni v. Selwyn*, Jac. R. 268.

(k) *Doyle v. Wright*, 4 Jurist, 380.

made, being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.(e) The court has jurisdiction, under 11 Geo. 4 and 1 Will. 4, c. 65, s. 32, upon petition of the father of the infant, where there was no guardian, and no cause depending with reference to the matter, to direct that the dividends on stock belonging to the infant, shall be paid to the father for the maintenance of the infant.(o)

*When Maintenance for infants will be ordered without Suit.*—The court will not order a reference for the maintenance of an infant [ \*695 ] on petition without suit, where the property \*is considerable, where it is necessary to take accounts in the master's office, or in cases where trustees, in whom a discretionary power is vested, are called upon to allow a maintenance for minors.(f) But it will be done on petition in special cases, as where there is a specific fund for maintenance, or the property is very small; and it was said that as a general rule, if the infant had 100*l.* per annum, a bill should be filed.(g) But in a subsequent case a guardian was appointed and maintenance allowed upon petition without bill, where the infant's income was 300*l.* a year. Sir J. Leach, M. R., who made the order, said, that unless the rule was otherwise fixed, he should entertain such petitions, where the income did not exceed that sum.(h) On the petition of an infant for a reference to approve of a guardian and of a proper sum to be allowed for his maintenance, where the amount of his property was stated to be about 200*l.* per annum, the order was made without suit.(i) And an order for a reference as to the maintenance of an infant out of his freehold estates, the rents of which were 260*l.* a year, was made upon petition without suit.(k) An order was made, on petition without suit, for the allowance of 450*l.* a year for the maintenance of an infant, the income of whose property exceeded 1500*l.* a year; Sir L. Shadwell, V. C., observing that he thought the distinction as to making orders on petition without suit, between cases where the income was above or below 300*l.* per annum, was without any foundation in principle.(x)

*Guardian appointed without a Reference.*—The aunt of two infant orphans, who had no property except a pension of 15*l.* a year, was appointed a guardian without a reference, for the purpose of receiving the pension.(l) And the same was done in a case where the infant was entitled to freehold property worth 80*l.* a year.(m) The costs of the guardian, incurred by a petition for his appointment, and for an allowance for the infant's maintenance, will be allowed in the guardian's account.(n)

(e) 11 Geo. 4 and 1 Will. 4, c. 65, s. 32; 3 Br. C. C. 88. and see ss. 36, 37, 38, 39, 40.

(o) *In re Naish*, V. C. 29 April, 1840, 18 Law Journ. 252.

(f) *Corbett v. Tottenham*, 1 Ball & B. 60.

(g) *Ex parte Mountfort*, 15 Ves. 448; *In re Molesworth*, 4 Russ. 308, n. See *Ex parte Whitfield*, 2 Atk. 316; *Ex parte Kent*,

(h) *Ex parte Lakin*, 4 Russ. 307.

(i) *Ex parte Myerscough*, 1 Jac. & W. 151.

(k) *Ex parte Starkie*, 3 Sim. 339.

(x) *In re Christie*, 9 Sim. 642.

(l) *In re Jones*, 1 Russ. 478.

(m) *Ex parte Jackson*, 6 Sim. 212.

(n) *Ex parte Salter*, 3 Br. C. C. 500.

The court refused to appoint a guardian without a reference, where the infant's property amounted to 150*l.* a year.(o)

*Order for Maintenance without a Reference.*—An order was made without a reference upon petition for the application [ \*697 ] of the principal sum of 298*l.*, belonging to two infants, for their maintenance from time to time. They had no other property, except some copyholds yielding about 6*l.* per annum.(p) So the interest of a sum of 1200*l.*, the property of three infants, was ordered to be paid to their father for their maintenance, without a reference.(q) Dividends, to which infants were entitled, were ordered without a reference to be paid to their father for their maintenance, the parties being poor and the property of small amount.(r) So an increased allowance for maintenance was made out of property of infants for the purpose of supporting their parents, who were in great indigence.(s) An infant's share of a residue, amounting to 125*l.* was ordered to be paid to his father, on account of the expenses (which the father had been forced to borrow money to defray) of the infant's outfit and passage to India.(t) An order was made upon petition, that part of a small sum of stock bequeathed to an infant, whose father had absconded, leaving his wife and children dependent upon her industry for support, should be sold, and the proceeds applied in payment of a debt incurred for necessities on his account, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance.(u)

*Maintenance allowed out of Principal and before Property had vested.*—The court of chancery will go considerable length in providing for the maintenance and education of infants. Where a small sum is given to an infant, the interest of which is insufficient for his maintenance and education, an allowance out of the principal will be made for the education of an infant, on the ground that it is most beneficial to him.(x) The court, however, does not so frequently break in upon capital for the mere purpose of maintenance, as for that of \*advancement.(y) The court made an order [ \*698 ] upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education and advancement, though the shares did not vest till the children came of age. The will contained a power of advancement for an apprentice fee or otherwise, in the discretion of the executors, for the advancement in life of any of the children during their respective minorities.(z)

In the case of a gift of a legacy by a parent to a child, the court allows interest by way of maintenance, although there is an omission of any direction as to interest, proceeding upon the ground of a very

(o) *Ex parte Janion*, 1 Jac. & W. 395.  
See *Ex parte Wheeler*, 16 Ves. 226.

(p) *Ex parte Green*, 1 Jac. & W. 253.

(q) *Ex parte Dudley*, 1 Jac. & W. 254 n;  
*In re Allsop*, 1 Cooper, C. C. 44.

(r) *Payne v. Low*, 1 Russ. & M. 223.

(s) *Allen v. Coster*, 1 Bea. 202. See *Heysham v. Heysham*, 1 Cox, 179; *Hamley v. Gilbert*, Jac. 354.

(t) *Clay v. Pennington*, 8 Sim. 359.

(u) *Ex parte Swift in re Swift*, 1 Russ. & M. 575.

(x) *Barlow v. Grant*, 1 Vern. 235; *Harvey v. Harvey*, 2 P. Wms. 21.

(y) *Walker v. Wetherell*, 6 Ves. 474.

(z) *Ex parte Chambers*, 1 Russ. & M. 577.

natural presumption, that a father, bound by natural duty to provide for the child, must intend that it should be maintained, though the payment of the legacy be postponed to twenty-one.(a) In *Inclendon v. Northcote*(b) a testator devised his real estate and the residue of his personalty upon trust to raise 5000*l.* for such of his children as should attain twenty-one, and it was held that the children were entitled to interest on their shares for their maintenance during their minority. So where a testator devised the residue of his real and personal estate to such of his children as should attain twenty-one, or marry under that age, with consent; all the children are entitled, although their interests are contingent, to have allowances out of the residue for their maintenance during their minority.(c) An allowance out of the residue, which was directed to be accumulated, was made for the support of a legatee in the interval between the time when the legatee attained his full age, and the time fixed for the distribution of the accumulated fund.(d)

In general, where children have a common interest to a fund, the income of the fund, if necessary, may be applied to their maintenance. Although the words of the will do not authorize [ \*690 ] the application of interest to the maintenance of the infants, yet if the court can collect before it all the individuals who may be entitled to the fund, so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance; but if the will contains successive limitations, under which persons not in being may become entitled, it is not sufficient that all the parties then living, presumptively entitled, are before the court, for none of the living may be the parties eventually entitled to the enjoyment of the property. In such a case an order for maintenance would be in effect, to give for maintenance of one person the property of another.(e) The case in which maintenance has been allowed, though not given by the will, is where there are children, some or one of whom must take the property, and all have an equal chance of surviving, and a present interest. But it cannot be done if there is a gift over, or if the children are not all the persons among whom it is to go, but future unborn children may become entitled to part of the fund. Lord Eldon said there is no case in which interest of property directed to accumulate has been applied to maintenance, except where it was one principal sum in which all were interested.(f) The result is, that if the chance of surviving is equal among all, and no other interest that upon any contingency would take effect will be defeated, maintenance shall be allowed out of the interest; but it is impossible to give it where, in any event under the operation and construction of the will, that interest may possibly belong to other persons.(g) In such cases the court will not order

(a) *Mitchell v. Bower*, 3 Ves. 287; *Chambers v. Goldwin*, 11 Ves. 1; *Crickett v. Dolby*, 3 Ves. 10; *Tyrrell v. Tyrrell*, 4 Ves. 1; *Greenwell v. Greenwell*, 5 Ves. 194; *Collis v. Blackburn*, 9 Ves. 470.

(b) 3 Atk. 433, 438.

(c) *Brown v. Temperley*, 3 Russ. 263.

(d) *McDermott v. Kealy*, 3 Russ. 264.

(e) Per Lord Eldon in *Marshall v. Holloway*, 2 Swanst. 436; *Kime v. Welfitt*, 3 Sim. 533.

(f) *Ex parte Kibble*, 11 Ves. 604; *Aynsworth v. Pratchett*, 13 Ves. 321.

(g) Lord Eldon, *Errat v. Berlow*, 14 Ves. 204; cited in *Turner v. Turner*, 4 Sim. 437.

maintenance without the consent of the persons who may ultimately become entitled.(h) Where the shares of children in a fund were contingent on the sons attaining twenty-four, or dying under that age, leaving issue, and on the daughters attaining twenty-four or marrying; but the legacy was not given over in the event of no child acquiring a vested interest; the court refused \*to order maintenance for the children, unless the testator's next of [ \*700 kin would consent.(i)

*As to the Father's Ability to maintain his Children.*—In general the court will not order maintenance out of a fund to which children are entitled, if the father be able to maintain them.(k) If the father is not of sufficient ability, the court will allow maintenance for the children, although the mother has a competent separate estate.(l) Where the father in consequence of bankruptcy was wholly unable to maintain his children, maintenance, with the consent of the person entitled in reversion, was directed by the court out of a fund bequeathed to grandchildren payable at twenty-one or marriage, or to the issue of those who were dead, with survivorship and accumulation till the time of payment, and a limitation over absolutely in case of the death of all without issue before that time.(m) Where a father had deserted his children, and was not of ability to maintain them, the court, on the petition of the children, will make an order referring it to the master to approve of a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infants that a certain sum shall be raised out of property to which they are absolutely entitled under a will; and upon the master's report that it is for their benefit, and with the consent of the executors of that will, the court will order the sum to be raised accordingly.(n) So maintenance was ordered for the children where the father's income, though considerable, bore no proportion to the fortune which was bequeathed to the children. In this case the residuary bequest to a very large amount was in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate and to be paid with the capital; and in case of the death of all the children before payment, there was a gift over to their mother absolutely. The court directed maintenance with the mother's consent.(o)

\*In many families the eldest infant is in possession of a [ \*701 ] large property, while the younger infants have only a small provision, in such a case the court does not measure the duty of

(h) *Fairman v. Green*, 10 Ves. 47; *Erington v. Chapman*, 12 Ves. 20.

(i) *Cannings v. Flower*, 7 Sim. 523.

(k) *Andrews v. Partington*, 3 Br. C. C. 60; *Mundy v. Earl Howe*, 4 Br. C. C. 226; see 2 Roper on Leg. 266, 3d ed. By a marriage settlement personal property was settled, by the father of the wife, in trust for her for life, with remainder to her children equally as tenants in common; and in default of a child obtaining a vested interest, in trust for the husband, with a direction that after the wife's death the trustees should apply the income at their discretion for the

maintenance and education of the children during their minorities. It was held, that after the wife's death the husband was entitled to require that the income should be applied to the maintenance and education of the children, notwithstanding that he was himself of ample ability to maintain and educate them. *Stocken v. Stocken*, 4 M. & Cr. 95; 4 Sim. 152; 2 M. & Keen, 489.

(l) *Haley v. Bannister*, 4 Madd. 275.

(m) *Fendall v. Nash*, 5 Ves. 197, n.

(n) *In Re England*, 1 Russ. & M. 439.

(o) *Cavendish v. Mercer*, 5 Ves. 195, n. See *Jervois v. Silk*, Coop. C. C. 52.



maintaining the eldest child by looking at him only, but it considers that it is for his interest that his brothers and sisters should be brought up in respectable stations. The principle on which the court acts in such a case, by giving for the maintenance of the eldest infant son a much greater sum than he can possibly require, is in order that all the children may be educated in a liberal way, and placed in such situations as may be creditable to such son.(n)

*Courts of Equity authorized to make Orders as to the Mother's Access to and Custody of Infant's in certain Cases.*—The statute 2 & 3 Vict. c. 54, after reciting that it was expedient to amend the law relating to the custody of infants, enacts, "that after the passing of this act, it shall be lawful for the lord chancellor and the master of the rolls in England, and for the lord chancellor and the master of the rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations, as he shall deem convenient and just."

*Affidavits may be received.*—The second section enacts, "That on all complaints made under this act, that it shall be lawful for the lord chancellor or the master of the rolls in England, and for the lord chancellor or the master of the rolls in Ireland, to receive affidavits sworn before any master in ordinary or master extraordinary of the court of chancery; and that any person who shall depose falsely and corruptly in any affidavit so sworn, shall be deemed guilty of perjury, and incur the penalties thereof."

[ \*702 ] *\*Orders may be enforced by Process of Contempt.*—The third section enacts, "That all orders which shall be made by virtue of this act, by the lord chancellor or the master of the rolls in England, and by the lord chancellor or the master of the rolls in Ireland, shall be enforced by process of contempt of the High court of chancery in England and Ireland respectively."

*Adulteress excluded from Benefit of Act.*—The fourth section enacts, "That no order shall be made by virtue of this act, whereby, any mother, against whom adultery shall be established, by judgment in an action for criminal conversation at the suit of her husband,(o) or by the sentence of an ecclesiastical court,(p) shall have the custody of any infant or access to any infant."(q) Under the custody of infants' Act (2 & 3 Vict. c. 54,) although jurisdiction is expressly given to the "lord chancellor and the master of the rolls," (the vice-chancellor being omitted,) still the vice chancellor has jurisdiction by virtue of the Vice Chancellor's Act (53 Geo. 3, c. 34), which in express terms gives jurisdiction to the vice chancellor in all those

(n) 1 Turn. & Russ. 13; 2 Russ. 28; *Lanoy v. Duke of Atholl*, 2 Atk. 447.

(o) See ante, pp. 387, 393.

(p) See ante, p. 395.

(q) See Hans. Parl. Deb. 3d series, Vol. 40, p. 1114; vol. 42, p. 1050; vol. 43, p. 144.

cases where, by any subsequently made statutes, jurisdiction might be given to the lord chancellor.(o)

The common law right of the father to the custody of the children(r) is not altered by this statute, but a discretionary power is given to the judges of the court of chancery to permit the mother to have access to her children and in some cases to have the custody of them.

*Cases in which the court refused to interfere.*—In a petition which has been presented under this statute, it appeared that the parties were married in 1829, of which marriage there were six children, five of whom were living, the eldest being nine years old, and the youngest three. In October, 1837, the wife left her husband's house under a charge of his infidelity, which was afterwards retracted, on discovering that it was without foundation. In consequence of this separation, the husband in the year 1838 left England, and had substantially lived abroad with his children since that time. In July, 1838, the wife commenced her suit in the ecclesiastical court for the restitution of conjugal rights, the husband's defensive allegation was rejected, and the court decided in favour of the wife's claim. The husband appealed to the Court of Arches, which affirmed the decision of the court below, and an appeal from that judgment was then pending before the privy council. The wife presented a petition under statute 2 & 3 Vict. c. 54, \*praying that the three youngest children, who were under the age of seven years, might be [ \*703 ] delivered to her, and that the court would declare her entitled to see and have free access to the other two who were above that age, at such times and subject to such regulations as the court should deem convenient and just. Sir L. Shadwell, V. C., thought that with reference to the jurisdiction the recent act had given to the court, that as it was to be exercised solely at the discretion of the court, it would hardly be a right thing for him to declare the wife entitled to have access to her children, pending the question in the ecclesiastical court for the restitution of conjugal rights. The conduct of the husband had been in his honour's opinion bona fide throughout. He went to France, and began the foreign residence prior to the institution of the suit in the ecclesiastical court, and if the court of chancery were to direct access at its discretion, "at such times and subject to such regulations as it should deem convenient and just," the court ought to be reasonably assured, before it interfered at all, that it could carry the sentence into execution. It might be true, if the children were here, the court might see its way with some facility as to the mode of executing its order; but he doubted very much whether the act was ever meant to be applicable to a case where the husband bona fide, before the presentation of any petition by the wife, had accidentally removed his children to a foreign country, that this court would interfere. It seemed to him rather to be inferred from the act, that as far as the husband and the children were concerned, their residence was to remain the same. It never meant that should be altered, and his honour did not foresee how, consistently with the fact of the husband persevering in his residence abroad (which, as far as the

(o) *In re Taylor*, 4 Jurist, 283.

(r) See ante, p. 671.

law at present stood, he might lawfully do) the court could ever succeed in making any order which would be capable of being carried into effect. The circumstance that at present it appeared to him that there ought to be no jurisdiction exercised under the act of parliament pending the question in the ecclesiastical court, combined with the difficulty of making any order which would be effectual, appeared to him a sufficient reason for not interfering. Under all the circum-

[ \*704 ] stances his honour left the parties at present \*to deal with the circumstances in which they were placed as they thought proper; and would not make any order until he was further informed of the result of the proceedings in the ecclesiastical court.(s)

In another application under this act access was refused on the ground that it would affect the interest of the children, as it appeared that the grandmother, by whom the children were supported, would have ceased to maintain them if the mother had been allowed access.(t)

*Education of Infant Felons entrusted to the Court of Chancery.*—The jurisdiction of the court of chancery has been further extended by statute 3 & 4 Vict. c. 90, entitled "An act for the care and education of infants who may be convicted of felony," which, after reciting that it is expedient that every facility should be offered for the improvement and better education of infants under the age of twenty-one, who have been or may be convicted of felony, enacts, "That in every case in which any person being under the age of twenty-one years shall hereafter (10 Aug. 1840) be convicted of felony, it shall be lawful for her majesty's High Court of Chancery, upon the application of any person or persons who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such court shall find that the same will be for the benefit of such infant, due regard being had to the age of the infant, and to the circumstances, habits and character of the parents, testamentary or natural guardian, of such infant, to assign the care and custody of such infant, during his or her minority, or any part thereof, to such person or persons, upon such terms and conditions, and subject to such regulations respecting the maintenance, education and care of such infant, as the said court of chancery shall think proper to prescribe and direct: and upon any order for that purpose being made, and so long as the same shall remain in force, the same shall be binding and obligatory upon the father, and upon every testamentary or natural guardian of such infant, and no person or persons shall be [ \*705 ] entitled to use or \*exercise any power or control over such infant which may be inconsistent with such order of the said court of chancery."

*Power to rescind or alter such Assignment, and award Costs.*—Provided always, that the said court may at any time rescind such assignment, or from time to time rescind, alter or vary any such terms or conditions, or such regulations, as to the said court may seem fit; and provided also, that the said High Court of Chancery shall and may award such costs as to it may seem fit, against any such

(s) *Taylor v. Taylor*, 4 Jurist, 959, Aug. 1840.

(t) In re Shaw, cited in *Taylor v. Taylor*, 4 Jurist, 960; see ante, pp. 692—695.

person or persons who shall make such application as aforesaid, if such application shall not appear to the said court well founded; and such costs shall be payable to any parent or other natural or testamentary guardian of any such child who shall oppose such application.(t)

*Infant not to be sent beyond the Seas.*—In every case it shall be a part of the terms and conditions upon which such care and custody shall be assigned, that the infant shall not, during the period of such care and custody, be sent beyond the seas or out of the jurisdiction of the said court of chancery.(u)

*No fee to be taken by Officer of Court.*—*Counsel may be assigned.*—No fee, reward, emolument, or gratuity whatsoever shall be demanded taken, or received by any officer or minister of the said court of chancery for any matter or thing done in the said court in pursuance of this act; and that upon the making or opposing of any such application it shall be lawful for any judge of the said court to assign counsel learned in the law and to appoint a clerk or practitioner of the said court to advise and carry on or to oppose such application, who are hereby required to do their duties therein without fee or reward.(v)

This act shall not affect or in any manner interfere with the execution of the sentence which may have been passed upon such infant upon his or her conviction.(x)

### SECT. III.—OF THE LEGITIMACY OF CHILDREN BORN DURING A SEPARATION.

*Marriage Proof of Paternity.*—It would exceed the limits assigned to this work to enter into a full examination of all the cases relative to the legitimacy of children.(a) All that will be attempted therefore will be a statement of the general principles on the subject. It is a fundamental principle of the common law that marriage is the proof of paternity. *Pater est quem nuptiæ demonstrant.*(b) By our law a bastard is every one born out of lawful matrimony.(c) Void and voidable marriages have been already the subject of consideration.(d) The children of a marriage which is *absolutely void* are illegitimate, whether sentence of nullity has been obtained or not. As if a man, having a wife, takes another, and has issue by her, such issue is illegitimate both by the civil and common law, for the second marriage was absolutely void.(e) So if a man marry, and be afterwards divorced *a vinculo*, the issue between them, born before or after the divorce will be bastards.(f) But the children of marriages which

(t) 3 & 4 Vict. c. 90, s. 1.

(u) *Ib.* s. 2.

(v) *Ib.* s. 3.

(x) *Ib.* s. 4.

(a) The cases on this subject are collected in Sir Harris Nicolas's *Treatise on Adulterine Bastardy*, 8vo. 1836; Mr. Le Marchant's *Report of the Gardner Peerage Case*, 8vo, 1828. See also Beck's *Medical Jurisprudence*, 193–207, 3d ed.; *Edinburgh Review*, vol. xlix, p. 190–217; *Quarterly Review*,

vol. lix, p. 48–62; *Law Magazine*, vol. iv, p. 25–49.

(b) Glanville, lib. vii. c. 12, 13? Bracton, lib. ii. c. 32, p. 70 b.; Britton, c. 66, pp. 166, 167.

(c) Co. Litt. 244 a.

(d) *Ante*, p. 479–485.

(e) Vin. Abr. *Bastard* (F); 1 Salk. 120; Holt's Rep. 457; 12 Mod. 432; *ante*, p. 223.

(f) 1 Rol. 359, l. 35. 360 (G); *Com. Dig.* *Bastard* (A.)

are merely *voidable*, will be legitimate if sentence of divorce be not obtained during the lifetime of both the parents.(g)

*Impotence.*—With regard to the impotence of the father, this conclusion may be drawn from all the cases, that where there is a natural impossibility that the husband could be the father of the child, whether arising from his being under the age of puberty, or from his [ \*707 ] labouring under disability \*occasioned by natural infirmity, these are grounds upon which the child's illegitimacy may be founded.(h) Evidence that a husband was divorced from his wife for impotence does not prove the bastardy of a child born during the second marriage,(i) for reasons already mentioned.(k) Evidence of inability from a bad habit of body was admitted; but the evidence amounting to an improbability only, and access being presumed from the visits of the husband, the evidence was deemed to be insufficient.(l)

*Obedience to a Sentence of Divorce is presumed.*—When a woman is separated from her husband by a divorce *a mensa et thoro* and lives with another man in adultery, by whom she has children, such children are bastards, for obedience to the sentence of divorce will be presumed until the contrary is shown. In such a case it will be incumbent upon those asserting the child's legitimacy to prove the husband's access. But if in the case of a voluntary separation between husband and wife, a child is born, the presumption is in favour of its legitimacy, until non-access of the husband shall be proved.(m)

*Antenuptial Generation.*—The marriage of the parties is the criterion adopted by our law in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, but looks only to the recognition of it by the husband in the subsequent act of marriage, which is considered as acknowledging by a most solemn act that the child is his.(n) Issue born of parents who have married so recently before the birth of the child that it could not have been begotten in wedlock, is legitimate even if the child be born within a month or a day after the marriage between the parties.(o)

*Illegitimacy of Children born in Wedlock may be established by* [ \*708 ] *Evidence of husband's Non-access.*—It already \*appears that the illegitimacy of the child of a married woman may be founded on circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered. The continued absence of the husband beyond the seas above two years before the birth of a child born by his wife, who remained at home, affords an irresistible conclusion that such child was a bastard.(p) So also if the husband be proved to have been beyond seas until within a fortnight of his wife's delivery, the child is a bastard;

(g) Vin. Abr. Bastard (A 2), pl. 2, 3, 4; Holt's Rep. 457; 2 Phil. R. 16.

(h) *Rez v. Luffe*, 8 East, 193; 1 Roll. Abr. 358.

(i) Com. Dig. Bastard (B); 5 Co. 98 b; 2 Leo. 169, 173; Dyer, 179 a.

(k) *Ante*, pp. 207, 208.

(l) *Lomax v. Holmden*, Str. 940.

(m) 1 Salk. 123; *Sidney v. Sidney*, 3 P. Wms. 275; *Pendrell v. Pendrell*, 2 Str. 925.

(n) *Rez v. Luffe*, 8 East, 207, 208.

(o) Co. Litt. 244 a.

(p) *Rez v. Maidstone*, 12 East, 550; *Rez v. Albertson*, 1 Ld. Raym. 123; 2 Salk. 483.

absence during the entire period of pregnancy being immaterial, where the circumstances of the case demonstrate a natural impossibility that the husband can be the father.(q) So a child, born so long after the death of the husband that it cannot have been begotten by him, must necessarily be illegitimate.(r) No difficulty can arise in deciding such questions as those just mentioned, unless the absence or death of the husband took place at such a recent period as to afford a reasonable presumption that he might have been the father of the child. Hence arises the necessity of considering in many cases the period of gestation.(s) So in cases where the husband is proved by clear evidence to be under a natural impossibility of begetting a child, whether arising from his being under the age of puberty, or from his labouring under disability by natural infirmity or disease, the question of the child's legitimacy is capable of easy solution.(t) But in cases where none of the last mentioned circumstances exist, if the individual whose legitimacy is disputed was born during a lawful marriage, another question may still arise, namely, whether that individual was the true and legitimate child of the married parties. The maxim of the jurists, "*pater est quem nuptiæ demonstrant*," was adopted by the common law with such extreme strictness that if it had appeared that the husband was within the kingdom, or, in the quaint language of the times, *inter quatuor maria*, the only proof of illegitimacy that could have been admitted was the proof of his total disability of person, an apparent impossibility of [ \*709 ] procreation.(u) But this doctrine has been exploded.(x)

As early as the time of Edward the First, the fact of access or non-access appears to have been considered an important subject of inquiry:(y) and Bracton lays down the rule in the following terms: "*Presumitur quis esse filius hoc ipso quod nascitur ex uxore, quia nuptiæ probant filium esse, et semper stabitur huic presumptioni, donec probetur contrarium; ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore infirmitate vel aliâ causâ impeditus, vel erat in eâ invaletudine ut generare non possit, vel probatur quod fuit absens per decennium, et reversus invenit anniculum, hic qui in domo mariti natus est (licet vicinis scientibus) non erit filius mariti.*"(z)

The law of this country respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon clear and satisfactory evidence. Every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled by proof of such facts as satisfy the jury or the court that no sexual intercourse took place between the husband and wife at a time when the husband could by possibility be father of the child; and the jury, before they can find against the legitimacy, must be convinced that *no* such sexual intercourse took place, by irre-

(q) *Rex v. Luffe*, 8 East, 193.

(r) 1 Roll. Abr. 356, l. 10. 40; Com. Dig. Bastard (A).

(s) See post, p. 726.

(t) See *Rex v. Luffe*, 8 East, 193.

(u) Co. Litt. 244 a.

(x) See *Dickens v. Collins*, cited in St.

*George v. St. Margaret*, 1 Salk. 123; *Pendrell v. Pendrell*, 2 Str. 924; 3 P. Wms. 276; Bull. N. P. 113.

(y) Case cited by Lord Ellenborough, 8 East, 206.

(z) 1 Bracton, ch. 9, p. 6 a; see *id. ch.* 32.

sistible evidence and not by a mere balance of probabilities.(a) The presumption of law is not lightly to be repelled; it cannot be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive, and such as will lead the mind to the clear conviction that the child in question was not the child of the husband.(b) In the [ \*710 ] case of husband and wife, living in such habits of intercourse \*as that the husband may be the father of the child, as the fact that the child is the child of A., is only presumption; it may be rebutted by circumstances, and the conclusion must be drawn from all the circumstances taken together.(c) The presumption in favour of legitimacy is sometimes strong, often weak, sometimes irrefragable. But being a presumption alone and not a rule of law, it is liable to be repelled by circumstances, inducing a contrary presumption, &c. Physical impossibility would be conclusive.(d) The presumption of the birth of a child in wedlock may be rebutted both by direct and presumptive evidence; first, by direct, as impotence and non-access; secondly, by all those circumstances which may have the effect of raising a presumption that the issue is not the issue of the husband.(e)

It was established by several early cases, that if it can be proved by *clear evidence* that the husband has not had access during the entire period of gestation, the child is a bastard.(f) In the case of a child born during the time of the voluntary separation of the husband and wife, evidence will be admitted to prove the illegitimacy of such child. For if a jury find the husband had no access, such child will be a bastard; as where the husband and wife by consent lived separately, and a child being born, an issue was directed to try whether the child was a bastard, and it was found a bastard.(g) The child of a married woman may be proved a bastard by other evidence than that of witnesses proving the husband to have been constantly resident away from his wife. Proof that the husband left Norwich, and went to reside in London, that his wife remained behind and lived with another man as his wife for some years, during which time the child in question was born; that this child always went by the adulterer's name, and was reputed illegitimate in the family; was held sufficient evidence of illegitimacy, though it did not clearly appear [ \*711 ] where \*the real husband had been from the time of conception to that of delivery.(h)

Some confusion has arisen upon this subject, from the different meanings attached to the word access; it has sometimes been used not as meaning sexual intercourse, but access affording opportunities of communicating together, opportunities of sexual intercourse, but not actual sexual intercourse. Where there has been personal access

(a) *Morris v. Davies*, 3 Carr. & P. 215. 427.

(b) *Morris v. Davis*, 5 Clark & Finn. 265—269.

(c) Lord Redesdale, *Le Marchant's Gardner Case*, 437, cited 5 Clark & Finn. 248.

(d) Lord Ellenborough, *Le Marchant's Gardner Case*, 456, cited 5 Clark & Finn. 248.

(e) Lord Redesdale, cited 5 Clark & Finn. 248.

(f) *Rex v. St. Bride's*, 1 Str. 51; *Pendrell v. Pendrell*, 2 Str. 925; *Rex v. Bedall*, 2 Str. 1073; *Rex v. Maidstone*, 12 East, 550.

(g) *Pendrell v. Pendrell*, 2 Str. 925; see 3 P. Wms. 275, 276.

(h) *Thompson v. Saul*, 4 T. R. 356.

as contradistinguished from sexual intercourse, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, which presumption must stand, unless it is satisfactorily repelled by evidence that there was not such sexual intercourse.(i) In the case of personal access affording an opportunity of sexual intercourse, it may be proved by persons present, that no such intercourse took place; in the absence of such direct evidence, the conduct of the parties prior to the interview in which personal access was had, and their conduct afterwards, may be gone into for the purpose of drawing a conclusion as to what occurred during such interview.(k) Access is such access as affords an opportunity of sexual intercourse; and where the fact of such access between a husband and wife, within a period capable of raising the legal inference as to the legitimacy of an after-born child is not disputed, probabilities can have no weight, and such a case will not be sent to a jury. Where there was nothing against the evidence of access, except evidence of the adulterous intercourse of the wife with another man, the court of chancery will not direct an issue, but will declare the children to be legitimate, upon the ground that public policy requires a strict adherence to the rule of law.(l) Access is not to be presumed between a man and his wife because the parties were within such a distance that access was possible. Upon a claim to the benefit of a settlement, the master reported against the legitimacy of the children, and exceptions were taken to his report. The mother lived with a man, and assumed [ \*712 ] his name, and the children were born during such cohabitation, and took the name of the man. But during all this time the husband was alive, and lived either in London, where the wife resided, or in the neighbourhood. It was insisted that there was not that impossibility of legitimacy which, within the principles of the case of *Rea v. Luffe*,(m) would bastardize the issue. But Leach, V. C., said, "the manner in which this case is argued would in effect revive the old principle of *extra quatuor maria*. Now access, like any other important fact, must be satisfactorily established; but access is not to be presumed because the parties were within such distance that access was possible. He could not encourage an issue, but would not refuse it to the children if they desired it."(n) In questions of this sort, the jury ought to be satisfied by cogent proof that the husband did not avail himself of the opportunity of intercourse; but if the jury are once satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father.(o)

But if the husband and wife are living separate, and the wife

(i) *Head v. Head*, 1 Turn. & R. 141.

(k) See 1 Turn. & R. 141.

(l) *Bury v. Philpot*, 2 M. & Keen, 349. See 1 Turn. & R. 142, and *Gilbs v. Hooper*, 2 M. & Keen, 353, as to granting a new

trial in a question of legitimacy.

(m) 8 East, 193.

(n) *Clarke v. Maynard*, 6 Madd. 364.

(o) *Cope v. Cope*, 1 Mood. & Rob. 276.



is notoriously living in open adultery, although the husband might have had an opportunity of access, it will not be presumed; and the legitimacy of a child born under such circumstances cannot be established.<sup>(p)</sup>

In *Day v. Day*, Mr. J. Heath said, that Lord Mansfield thought that a family likeness was a material proof that a child was the genuine offspring of the parents from whom he claimed, referring to the following observations of Lord Mansfield in the *Douglas cause* in the house of lords: "I have always considered likeness as an argument of a child's being the son of a parent, and the rather, as the distinction is more discernible in the human species than other animals; [ \*713 ] a man \*may survey 10,000 people before he sees two faces perfectly alike; and in an army of 100,000 men, every one may be known from another. If there should be a likeness of feature, there may be discriminacy of voice, a difference in the gesture, the smile, and various other characters; whereas a family likeness runs generally through all these; for in every thing there is a resemblance, as of features, size, attitude and action."<sup>(q)</sup>

In *Smyth v. Chamberlayne*,<sup>(r)</sup> which arose on the grant of administration, and where the sole question respected the legitimacy of the intestate, it appeared that John Newport was the son of Ann Smyth, wife of Ralph Smyth, and was born whilst her mother (being separated from her husband) was living with Lord B. as his mistress; he was bred up and educated by that nobleman as his son, inherited a large fortune from his reputed father, and assumed the name of Newport under an act of parliament. Ralph Smyth had been separated from his wife some years before the birth of Newport, and they continued to live apart ever after, he living obscurely in Holburn; she in an expensive establishment at the west end of London and Hammer-smith; they had interviews respecting an annuity, but none within a considerable time of Newport's birth: of Newport, Ralph Smyth was never known to take the slightest notice, and he sank into a mental disorder, to which two brothers of Lord B. had fallen victims, and he was placed by the court of chancery under the care of members of Lord B.'s family; Ralph Smyth allowing the court to act as if no doubt existed as to his illegitimacy. Sir William Wynne said, "The law of England as now settled is this; that if such proof can be given, of whatever kind, as shall satisfy legally the mind of the court that the husband had no access to the wife at the time when the child must have been begotten, the child is a bastard, though born of a married woman in the lifetime of the husband; but if the husband and wife were so circumstanced that access between them must be presumed, as if they lived in the same town or place,<sup>(s)</sup> and cannot be [ \*714 ] proved by persons who have watched \*them never to have come together; if direct evidence can be proved that they had access to each other; in such a case I take it the son is legitimate, notwithstanding any circumstantial evidence that may be given to the contrary." In this case the learned judge was of

<sup>(p)</sup> *Cope v. Cope*, 5 Carr. & P. 604; 1 Wood. & R. 269.

<sup>(q)</sup> Sir H. Nicolas's Treat. 140, n.; 1 Paris Fonbl. Med. Jurisp. 220.

<sup>(r)</sup> *Arches*, 1772; *Le Marchant's Gardner case*, 352; *Nicolas on Ad. Bast.* 147.

<sup>(s)</sup> See *Bury v. Philpot*, 2 M. & Keen, 249.

opinion, from the proofs in the cause, that the mother of the deceased must be presumed to have had access to her husband at the time she became pregnant of the deceased, and consequently that the deceased must be considered to have been legitimate. In the case of *Routledge v. Caruthers*,<sup>(t)</sup> though acts of adultery on the part of the wife were frequent and notorious, and though the question of actual paternity was extremely doubtful, it being a point of uncertainty whether the husband had access at the time when the conception took place; yet as the mother was married, and there was neither corporal infirmity, nor impossibility from distance of places of the husband being the father, the presumption of law that *pater est quem nuptiæ demonstrant* was allowed to prevail, it not having been clearly made out that there was an impossibility of the husband being the father of the child. In this case, the husband having cohabited with his wife for ten years without having any child by her, left her in the beginning of August, 1740, and she was not then with child. He returned after some months, when he found her with child, and brought an action of divorce against her. She was delivered of a daughter on the 28th of May, 1741. The decree in the suit for divorce was not pronounced for six months afterwards. The judges in Scotland held that the daughter was the legitimate child of the husband, and that decision was affirmed in the house of lords.

The important doctrine propounded in the celebrated case of the *Banbury Peerage*<sup>(u)</sup> is, that in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of [ \*715 ] those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child. The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can be legally resisted only by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time when by such intercourse the husband could, by the laws of nature, be the father of such child. When the legitimacy of a child in such a case is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child, and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove to the satisfaction of a jury that no sexual intercourse took place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child.

In the *Banbury Peerage* case there were facts which undoubtedly,

(t) Le Marchant's report of Gardner case, 343—352; Nicolas, 155—163; 4 Dow, P. C. 392—403. See 5 Clark & Finn. 235.

(u) 1 Sim. & Stu. 150; Le Marchant's Gardner case, App. 433; Sir H. Nicolas Treat. 181; 5 Clark & Finn. 229, 230.

if taken by themselves, would have been proof of the legitimacy of the child; there was the marriage, the absence of all proof of impotency from the age of the earl, the age might make it more or less probable, but there was no evidence to show that he was of that age which rendered it impossible that he should be the father of a child. There was no natural impediment proved; there was the absence of all evidence of the parties living together otherwise than as husband and wife ordinarily live together. But then the question was whether the husband and wife had sexual intercourse so as to make it possible for the husband to be the father of the child. The circumstances of the conduct and history of the transaction, the facts which attended the birth of the child, the mode in which the child was recognized by the one party and never brought to the knowledge of the other, the conduct of those who alone could have knowledge of the fact [ \*716 ] whether the husband was the father of the child or not, \*were all considered so strong as in that case to repel the legal presumption of the child born in wedlock of the wife being the child of the husband.(x)

The questions proposed to the judges by the house of lords in this case, with the answers of the judges thereto, are inserted in the subjoined note, for though not amounting to judicial decisions the doctrine pronounced on them is generally referred to on these questions, and has been frequently recognized in subsequent cases on this subject.(y)

(x) See *Morris v. Davis*, 5 Clark & Finn. 250; see *Le Marchant's Gardner case*, 284, 285.

(y) 1 Turn. & Russ. 140; 5 Clark & Finn. 250—253.

The questions put to the judges by the house of lords and answers thereto were as follows:—

"1st. Whether the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption."

The lord chief justice of the Common Pleas stated that it was the unanimous opinion of the judges, "that the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption, and gave his reasons.

"2d. Whether the fact of the birth of a child from a woman united to a man by lawful wedlock be always, or be not always, by the law of England, *prima facie* evidence that such a child is legitimate; and whether in every case in which there is *prima facie* evidence of any right existing in any per-

son, the *onus probandi* be always, or be not always upon the person or party calling such right in question. Whether such *prima facie* evidence of legitimacy may not always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife as by the laws of nature is necessary in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be,) may always be lawfully proved, and can only be lawfully proved by means of such a legal evidence as is strictly admissible in every other case in which it is necessary by the laws of England that a physical fact be proved."

The lord chief justice of the Common Pleas delivered the unanimous opinion of the judges upon this question as follows:—

"That the fact of the birth of a child from a woman united to a man by lawful wedlock is generally, by the law of England, *prima facie* evidence that such child is legitimate. That in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question.

"That such *prima facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife as by the laws of nature is necessary

\*In *Head v. Head*,<sup>(2)</sup> the first case that occurred after [ \*717 ] the answers of the judges to the questions put to them in

in order for a man to be, in fact, the father of the child.

"That the physical fact of impotency, or of non-access, or of non-generating access, (as the case may be,) may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary by the law of England that a physical fact be proved."

"3d. Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which according to the laws of nature he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access."

"4th. Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact."

In answer to the said questions the lord chief justice of the Common Pleas delivered the unanimous opinion of the judges on the same as follows:—

"That after proof given of such access of the husband and wife, by which according to the laws of nature he might be the father of a child, (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tend to falsify the proof that such intercourse had taken place."

"That such proof must be regulated by the same principles as are applicable to the establishment of any other fact."

"5th. Whether evidence may be received and acted upon to bastardize a child born in wedlock after proof given of such access of the husband and wife, by which according to the laws of nature he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access."

"6th. Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact."

In answer to the said questions the lord chief justice of the Common Pleas delivered the unanimous opinion of the judges on the same as follows:—

"That proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child, (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tend to falsify the proof that such intercourse had taken place."

"Such proof must be regulated by the same principles as are applicable to the establishment of any other fact."

"7th. Whether in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place after marriage between the husband and wife, (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such non-access as negatives such presumption of sexual intercourse within the period, when according to the laws of nature he might be the father of such child."

"8th. Whether the legitimacy of a child born in lawful wedlock, (the husband not being proved to be separated from his wife by sentence of divorce,) can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access during the period within which the husband, by the laws of nature might be the father of such child; and whether any other question but such non-access can legally be left to a jury upon any trial in courts of law to repel the presumption of the legitimacy of a child so circumstanced."

The lord chief justice of the Common Pleas delivered the unanimous opinion of the same as follows:—

"That in every case where a child is born in lawful wedlock, (the husband not being separated from his wife by a sentence of divorce,) sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when by such intercourse the husband could according to the laws of nature be the father of such child."

"That the presumption of legitimacy of a child born in lawful wedlock, (the husband not being separated from his wife by a sentence of divorce,) can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time when by such intercourse the husband could by the laws of nature be the father of such child. Where the legitimacy of a child in such a case is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child, and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove to the satisfaction of a jury, that no sexual intercourse

(2) 1 Sim. & Sta. 150; 1 Turn. & R. 138.

the *Banbury Peerage case*, the facts were shortly these; William [ \*718 ] \*and Elizabeth Head were married in 1795, and in consequence of disagreements between them on account of the drunken habits of the husband, separated in 1797. The wife went to reside at the house of her uncle, Thomas Randall, who had a son, James Randall, living with him. William Head was in the habit of visiting his wife during her residence at her uncle's house, and upon the occasion of the last interview between them, in July or in August, 1798, they were alone in the kitchen for some time. Elizabeth Head afterwards became pregnant, and left her uncle's. On the 7th May, 1799, the plaintiff was born, and was baptised by the name of James the son of William and Elizabeth Head. William Head died in [ \*719 ] 1800, and in 1806 Elizabeth Head married James \*Randall, and had afterwards another child. After the marriage of his mother, the plaintiff was sent to school by the name of James Randall, and he subsequently used and was known by that name; but there was no evidence of any familiarity having passed between James Randall and Elizabeth Head up to the time of her leaving the house of Thomas Randall. Sir J. Leach, vice-chancellor, directed an issue upon the question of the legitimacy of the plaintiff, James Head or Randall. It was tried before Burrough, J., who laid down the law to the jury in the language of Lord Ellenborough in *R. v. Luffe*, that where a child is born of a married woman, the husband is presumed to be the father, unless physical impossibility of his having begotten it be shown. The jury found for the legitimacy. A motion for a new trial was moved for on the ground of a misdirection; but it was ordered to stand over till an authentic copy of the opinions of the judges in the *Banbury Peerage case* could be obtained. Afterwards the vice-chancellor refused a new trial, on the ground that he was satisfied with the verdict, but admitted that the rule laid down by the judge from *R. v. Luffe*(a) could not be reconciled with the opinions of all the judges in the *Banbury case*, and made the following general observations: "The ancient policy of the law of England remains unaltered; a child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not be the father. But in modern times the rule of evidence has varied; formerly it was considered that all doubt could not be excluded unless the husband were *extra quatuor maria*. But as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a nature to exclude all doubt, and when the

took place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such a child.

"The non-existence of sexual intercourse is generally expressed by the words 'non-access' of the husband to the wife, and we understand those expressions, as applied to the present question, as meaning the same thing; because in one sense of the word

'access' the husband may be said to have access to his wife as being in the same place or the same house; and yet under such circumstances as instead of proving tend to disprove that any sexual intercourse took place between them." 1 Sim. & Sta. 150; *Le Marchant's Gardner case*, Appendix, 433; Sir H. Nicolas's Treat. 181; 5 Clark & Fin. 229, 230.

(a) 8 East, 193.

judges in the *Banbury case* spoke of satisfactory evidence upon this subject, they must be understood to have meant such evidence as would be satisfactory, having regard to the special nature of the subject. It is to be deduced as a corollary from the opinions of the judges in that case, that whenever a husband and wife [ \*720 ] are proved to have been together at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was *prima facie* to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place; and not, by mere evidence of circumstances which might afford a balance of probabilities against the fact that sexual intercourse did take place." In *Morris v. Davies* (b) the husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent. It was held that the presumption of law in favour of legitimacy of a child begotten and born of the wife during separation may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct; such as that the wife was living in adultery, that she concealed the birth of the child from the husband and declared to him that she never had such child, that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. In this case it was contended on one side, that when there is evidence showing the husband and wife to have been in such a situation together as that sexual intercourse might have taken place, the presumption of law that it took place is not to be rebutted by circumstantial evidence, such as evidence of subsequent conduct. It was, however, admitted that such inference may be met, and, if the circumstances be strong enough, repelled, by evidence demonstrating the probability or showing the improbability that such intercourse did in fact take place upon the occasion, such as the shortness of the time the parties [ \*721 ] were together, for the purpose for which they met, and the circumstances of the place in which they were; that is, by evidence not going directly to negative the fact of sexual intercourse, but by circumstantial evidence negating the presumption of such intercourse having been used for the purpose of sexual intercourse, by raising from the facts proved a still stronger presumption that no sexual intercourse did in fact take place. But it is contended that such circumstantial evidence must be confined to the particular circumstances of such meetings. The point in issue therefore was, whether the husband and wife on the occasions referred to had sexual intercourse, that is, whether they committed a certain act, and it has not

(b) 5 Clark & Finn. 163; 3 Car. & P. 215. 427.

been explained why, if circumstantial evidence be received to prove or disprove the act of one party, such circumstantial evidence is to be confined to the particular period of the imputed act, and why the subsequent acts and conduct of the parties are not to be looked at and considered for the purpose of establishing or repelling the presumption of the act in question having taken place. If after the birth of a child whose legitimacy is questioned the husband and wife had acknowledged the child as legitimate, such recognition would, beyond all doubt, be received as strong evidence of legitimacy; but if so, evidence of their having repudiated the child as illegitimate must be receivable to disprove the legitimacy. The argument of the appellant was put thus, if sexual intercourse be proved, no evidence will be permitted to prove the child illegitimate; and proving the husband and wife to have been in situations in which sexual intercourse may have taken place, is proof of sexual intercourse. And as no distinct proof of actual sexual intercourse is required or capable of being given, therefore no evidence can be received to prove the child illegitimate. This argument appeared to rest entirely upon confounding two things which are perfectly distinct, viz. the proof or conclusion of sexual intercourse having taken place, with the evidence by which the conclusion is to be established. If sexual intercourse be proved, that is, if the jury or the judge trying the question of fact be satisfied that sexual intercourse took place between the husband and wife at the [ \*722 ] time of the child being conceived, the law will not \*permit an inquiry whether the husband or some other man was more likely to be the father of the child; and some facts are so strong as to afford irresistible evidence of sexual intercourse having taken place, such as the husband and wife sleeping together, there being no natural impediment to sexual intercourse; but in the absence of such irresistible evidence, the fact of sexual intercourse must be tried like every other fact to which no direct evidence is applicable. Proof that the husband and wife were living in the same town, and so had opportunities of meeting, and therefore of sexual intercourse, would, in the absence of any proof raising a presumption to the contrary, be sufficient to establish the legitimacy of a child born of the wife. Proof that they had been in the same room or in the same house together would be much stronger evidence of the fact, the strength of which however would vary with the circumstances; and as neither would be direct proof of sexual intercourse, but of facts from which, taken by themselves, sexual intercourse would be inferred, such inference must, as in all other cases, be capable of being repelled by proof of facts tending to raise a contrary inference. The argument for the appellant, assumed as a rule of law that no evidence is admissible to disprove sexual intercourse having taken place where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house. This is very like attempting to establish a doctrine of *infra quatuor muros*, instead of the exploded doctrine of *quatuor maria*. But it is admitted that the parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence, raising a strong presumption against the fact. If so, the presumption does

not stand on any positive rule of law, but upon evidence of the fact, as to which the ordinary rules of evidence must be applied.”(c)

The result of this case is, that all the circumstances may be looked into for the purpose of deciding whether sexual intercourse did take place between the husband and wife at such time as might make it possible for him to have been the father \*of the child, and [ \*723 ] that the fair and reasonable result of such inquiries was the conviction that no such intercourse did take place, and that the child was not his. The appeal was therefore dismissed, but without costs, after the various conflicting verdicts which had been given upon the case.

*Evidence of Husband or Wife as to Access not admissible.*—Upon the trial of an issue as to access or non-access of the husband, whether arising at the sessions or upon a trial directed by the Court of Chancery, it is an indisputable rule of law, that, for the purpose of proving non-access, neither the husband nor the wife can be examined as witnesses. Upon the trial of a question as to the legitimacy of a child procreated during the marriage of A. and B., neither A. nor B. is a competent witness to prove the non-access of A. Nor can their evidence of facts, from which non-access may be inferred, be received for that purpose,(d) as that the husband at a particular time lived at a distance from his wife and cohabited with another woman. Nor can the woman give evidence of the non-access of her husband, for the purpose of bastardizing her issue, though the husband be dead at the time of her examination as a witness.(e) In the case of an order of maintenance of a bastard, the evidence of the woman may prove the fact of adultery with her, but cannot prove the non-access of the husband.(f) But after other proofs of non-access, her testimony will *ex necessitate* be evidence as to the putative father.(g)

Proof of the parents' declaration on oath or otherwise is evidence after their decease of the fact of marriage and the time of birth;(h) and so is the declaration or memorandum of a surgeon, deceased, as to the latter fact.(i)

Declarations in the family, descriptions in wills, upon monuments, in Bibles and registry books, are all admitted, upon the principle that they are the natural effusion of a party who \*must know [ \*724 ] the truth; and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.(k) The declarations of a party connected by marriage are receivable in evidence. Consanguinity or affinity by blood is not necessary, for this obvious reason, that a party by marriage is more likely to be informed of the state of the family, of which he is become a member, than a relation who is only distantly con-

(c) *Morris v. Davies*, 5 Clark & Finn. 241—244.

(d) *Rex v. Inhabitants of Sourton*, 6 Nev. & M. 575; 5 Ad. & Ell. 180; *Rex v. Reading*, Rep. temp. Hardwicke, 79; *Rex v. Rook*, 1 Wils. 140; *Goodright v. Moss*, Cowp. 394.

(e) *Rex v. Kea*, 11 East, 132.

(f) *Rex v. Rook*, 1 Wils. 240.

(g) *Rex v. Reading*, Rep. temp. Hardw.

79; *Rex v. Bedell*, Andr. 8; Gilb. Ev. 139; *Rex v. Luffe*, 8 East, 263.

(h) *Anon.* 12 Vin. 247, (T. b. 91); *Rex v. Bramley*, 6 T. R. 330; *May v. May*, Bull. N. P. 112.

(i) *Higham v. Ridgway*, 10 East, 109, 120.

(k) Per Lord Eldon, *Whitelocke v. Baker*, 13 Ves. 514, cited 2 Russ. & M. 159; *Higham v. Ridgway*, 10 East, 120.



nected by blood.(l) The declarations must be made *ante litem motam*. If there be *lis mota*, or any thing which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence.(m)

The declarations of husband or wife cannot be received to bastardize their children.(n) In *Smyth v. Chamberlaine*(o) Sir William Wynne observed, on the statements of the husband and wife tending to show the illegitimacy of the child, "This disavowal by the father and mother was not, I conceive, such as by law they were allowed to make; Lord Mansfield says, the law of England is clear that the declaration of a father and mother cannot be admitted to bastardize the son born after marriage; and this is a rule, notwithstanding what has been said of it, which in my opinion is entitled to the utmost deference, not only from the authority which belongs to every thing delivered by that great judge, but from its conformity with the early decisions, and its tendency to preserve order, and to prevent confusion in the descent of property and the administration of justice. It is a rule not only of the law of England, but of the 47th title. It may at first sight appear oppressive to the husband, but we should recollect that a husband, who is injured by his wife, may obtain a separation from her, and thereby escape all danger of a spurious progeny. If a husband connives at his wife's living with another person, he exposes [ \*725 ] himself to the consequences of such baseness,\* and access must be presumed in the absence of proof to the contrary. This is not the only case of a similar nature in which the law rejects evidence opposed to a presumption, though such evidence shall amount altogether to full proof. If a woman, big with child by A., be married to B., it is clear that the latter becomes the legal father."

A baptismal register, in which the party is described as the illegitimate son of his mother, is admissible evidence on the trial of an issue as to the legitimacy of such son; but Alderson, B. said that it could only be treated as evidence of the reputation in the village. It is not proved on what ground, or by whose procurement, the entry had been made; and that if the entry had been made by the procurement of the mother, it would not be admissible evidence at all.(p) In questions of pedigree the rule is to limit the admissibility of declarations to members of the family. The declarations of an illegitimate member of a family respecting his illegitimate brothers are not admissible as reputation, the declaration being that one of the brothers had died without issue; for the brother was not in point of law a member of the family of his reputed father.(q) So declarations of servants and intimate acquaintances are not admissible evidence in questions of pedigree.(r) Tradition is admissible evidence in cases of pedigree. For instance, suppose the hour of one child's birth to the death of its parent, it had always been treated as illegiti-

(l) *Doe d. Futter v. Randall*, 2 Carr. & P. 25.

(m) *Ibid.*; *Monckton v. Attorney General*, 2 Russ. & M. 160; *Doe d. Tilman v. Tarver*, 1 Ry. & Moody, 141.

(n) *Cope v. Cope*, 5 Carr. & P. 604.

(o) *Le Marchant's Gardner Case*, 370.

(p) *Cope v. Cope*, 1 Mood. & Rob. 276; 5 Carr. & P. 604.

(q) *Doe d. Bamford v. Barton*, 2 Mood. & Rob. 2d. See *Rex v. Erith*, 8 East, 539.

(r) *Johnson v. Lawson*, 2 Bing. 86. 341.

mate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of Buckingham's was), are all good evidence. So the declarations of parents in their lifetime.(s) On an issue from chancery to try the legitimacy of a party born of a married woman, since deceased, declarations by her that he was not the son of her husband, but of another man, are not admissible, nor are such declarations of the husband \*admissible.(t) In the proof of [ \*728 ] a pedigree the dying declarations of A. as to the relationship of a person who claimed as heir at law of the person last seized are not receivable in evidence.(u) General declarations, or the answer of a parent in chancery, are good evidence, after the death of such parent, to prove that a child was born before marriage, but not to prove that a child born in wedlock is a bastard.(x) The supposed husband or wife, having no interest, is a competent witness to disprove a marriage.(y) So parents may be called as witnesses with respect to the legitimacy of their issue; so on the other hand, they are not incompetent to prove that their children are illegitimate, although in the latter case their testimony is open to much observation.(z)

*Period of Utero Gestation.*—The period of utero gestation is a matter for consideration in some cases of the birth of a posthumous child, or in case of the husband's absence from his wife for such a length of time as to render it doubtful whether, according to the usual course of nature, he could have been the father of the child. It is stated by a writer of considerable authority on this subject,(a) that by the common consent of mankind, the ordinary term of gestation is considered to be ten lunar months, or forty weeks. This period has been adopted, because general observation, in cases which allowed of accurate calculation, has proved its correctness. It is not however denied that differences of one or two weeks have occurred. The eminent anatomist, Dr. Hunter, in answer to the three questions: 1. The *usual* period of a *woman's* going with child? which is the *earliest* term for a child's being born alive? and what the *latest*? replied, 1. "The usual period is nine calendar months; but there is very commonly a difference of one, two, and three weeks. 2. A child may be born alive at any time from three months; but we see none born with powers of coming to manhood or of being reared before seven calendar months or near that time. At six months it cannot be. 3. I have known a woman bear a living child in \*a [ \*757 ] perfectly natural way, fourteen days later than nine [ \*757 ] calendar months, and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.(b)

(s) *Goodright v. Moss*, Cowp. 594; *Kidney v. Cockburn*, 2 Russ. & M. 167.

(t) *Cope v. Cope*, 1 Mood. & Rob. 269.

(u) *Doe d. Sutton v. Ridgway*, 4 B. & Ald. 53.

(x) *Goodright v. Moss*, Cowp. 591.

(y) *Rex v. St. Peter's*, Burr. S. C. 25; Bull. N. P. 112; Cowp. 593.

(z) *Rex v. Bramley*, 6 T. R. 330.

(a) Beck's Med. Jurisp. p. 193, 3d ed.

(b) Harg. Co. Litt. 123, b. n.

It is impossible indeed in the nature of things that this difference should not occur, since females usually calculate from the time when the *meneses* disappear, and pregnancy may occur at any period between the interval. In particular cases also, where the menstrual function is irregular or disordered, the danger of mistake is increased, and undoubtedly we may add to these, the variety that occurs in the period of quickening. This is uncertain, yet it is much relied upon by females, and considered a proper era from which a calculation may be dated.(c)

When the way in which married people commonly live together is considered, having constant access and frequent intercourse with one another, it is obvious that medical men have not an opportunity of knowing exactly the time when conception commenced, and consequently it is utterly impossible for them to know exactly the pregnancy. Medical men however in large practice meet with cases in which the time of conception is accurately known, and therefore the length of pregnancy is actually known, and such cases have led them to the conclusion that their calculation is exceedingly accurate, and the period of gestation as nearly as possible nine calendar months, sometimes a day or two before, sometimes a day or two beyond.(d) This period was allowed on both sides as constituting the ordinary ultimate range in a case in which the subject was matter of judicial investigation by the house of lords.(e) This part of the subject will be dismissed with a quotation from an eminent author on medical jurisprudence.(f) "The natural duration of the time of pregnancy or gestation is *thirty-nine weeks and one day*, or nine calendar months; and the only difficulty or uncertainty in general is the time [ \*728 ] \*from which this period begins to run. If there has only been a single *coitus*, then it is to be calculated from that event; and some women, it is said, from peculiar sensations a few hours after intercourse, can tell when in fact impregnation has been accomplished; some reckon from the usual cessation, or rather non return of the *catamenia*, reckoning from its last appearance and adding a fortnight; whilst others calculate from the time of quickening, reckoning five months after that event, but as that event does not uniformly take place at the sixteenth week, it has been deemed an uncertain period from which to calculate.(g) Dr. Denman observes, that in order to avoid any great error, it is customary to take the middle time, and to reckon forty two weeks from the last act of menstruation, by which method, if rightly informed as to that event, then no egregious mistake can arise.(h) Dr. Paris observes, that the term does not appear to be so authoritatively established, but that nature may occasionally transgress her usual law, and that in several tolerably well attested cases the birth appears to have been protracted *several weeks* beyond the common time of delivery; and Dr. Hamilton remarks, that if the character of the mother be unexceptionable, a

(c) Beck's Med. Jurisp. 194, 3d ed.

(d) Gardner case, Ev. of Dr. Gooch, pp. 40, 41.

(e) See Le Marchant's Rep. of Gardner case, 8v., 1828.

(f) 1 Chitty Med. Jurisp. 405, 406.

(g) Denman's Prac. Mid. 175; Blundell's Lect. Mid. 256; 1 Paris & Fonbl. 218, 230, 245, 248; Id. appx. 3 vol. 209, 222; Smith, 492; 5 Good, 158.

(h) Denman's Pr. Mid. 175.

favourable report ought to be given for the mother, though the child should not be produced till *nearly* ten calendar months after the absence or sudden death of the husband.(i) Dr. Smith states, that it is admitted that a woman may carry a child to the eleventh month;(k) and that although in this country the usual time of birth is considered to be 280 days after conception, making a period of nine months, of thirty days each, and ten days more; yet that a child may be born nine months and *twenty* days after the death of his father; but where the child was born eleven months after the death of the husband, and it was proved that the father could not have had intercourse with his wife within a month before his death, it was adjudged \*a bastard;(l) he states that real excess beyond nine months [ \*729 ] is by no means frequent, and certainly never great; and he suggests that considering the fallacy of a woman's sensation, if any, as to the period of conception, and the very great probability of her having been mistaken in the first instance to the extent of about three weeks, by reckoning conception from sexual intercourse immediately after the last appearance of the *catamenia*, while in reality it may not have taken place until just before they should have appeared again, the erroneous supposition of ten month's pregnancy might be explained at once, added to which it may occur that the *catamenia* may cease from other causes, and conception may take place during their influence.(m) Another author states that the ordinary time of gestation is *forty-two* weeks to be commenced in reckoning from the middle of the last menstruation, ascertaining the time it ceased;(n) but that even twelve months is a term allowed by some physicians as what may take place under peculiar weakness or delicacy of health; though he suggests that it is most probable that in all these cases the mother was mistaken as to the proper time of her conception, and has imagined herself to have conceived for some weeks or even months before it actually took place."(o)

We now proceed to the cases which have occurred on this subject. If a man dies and his widow soon after marries again, and a child is born within such a time as that by the course of nature it might have been the child of either husband, in this case the child is said to be more than ordinarily legitimate, for he may, when he arrives to years of discretion, choose which of the fathers he pleases.(q) But it seems that the circumstance of the case, instead of the choice of the issue, must determine who is the father.(p) It is said that if born above forty weeks after the death of the first husband, it shall be the child of the second husband, but if within seven months after the death of the first husband, it shall be the \*child of the first husband.(r) [ \*730 ] It was considered by Lord Coke that it was established by the law of England that the *ultimum tempus gestationis* was nine

(i) See cases in Midw. by Dr. Hamilton, 1795; 1 Paris & Fonbl. 245, 248. See opinions in Runnington on Ejectment, 1st ed.; 2 Stark. Ev. 138, n. (p).

(k) Smith, 492.

(l) Smith, 492, 493, cites Burn's Justice, tit. Bastard.

(m) Smith, 493, 494; 5 Good, 159.

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(n) 5 Good, 160, 166.

(o) 1 Chitty's Med. Jurisp. 405, 406; see Ency. Brit. Midwifery, ch. iii.

(p) Co. Litt. 8; 1 Bl. Com. 456.

(q) Br. Abr. Bastardy, pl. 18; Pa'm. 10; 1 Rol. 357, l. 30.

(r) Com. Dig. Bastard, (B).

months or forty weeks.(s) Mr. Hargrave dissents from this opinion and maintains that the precedents quoted by him, so far from corroborating Lord Coke's limitation of the *ultimum tempus pariendi*, do, upon the whole, rather tend to show that it hath been the practice in our courts to consider forty weeks merely as the more *usual* time, consequently not to decline exercising a discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have so required.(t) In some countries there is a fixed period of calculation; thus by the law of Scotland a child born after the expiration of ten solar months, or 300 days, after the husband's death, is accounted a bastard.(u)

In England the calculation rests solely on received opinions and a few decisions. In *Alsop v. Boutrell*, a child born forty weeks and ten days after the death of the father, and under circumstances which might have postponed labour, was held to be legitimate, Lord Hale remarking *quia partus potest protrahi decem dies ex accidente*.(x) In *Forster v. Cooke*,(y) the legitimacy of a child born forty-three weeks all but one day after the possibility of access was held to be legitimate; but Lord Eldon said that he held that case to be of very little importance.(z) The doctrine of the law of England on the duration of utero-gestation, was the subject of much discussion before the house of lords in the Gardner Peerage case, in 1825, in which one point attempted to be established by the medical evidence was, that the time of imputed gestation was so long as to render it impossible for the husband to have been the father of the child. In that case there were two claimants to the barony of Gardner; the one Henry Fenton Gardner, the alleged issue of Captain Gardner's first marriage, but [ \*731 ] whose legitimacy was disputed. The other was \*Allen Legge Gardner, the undoubted issue of a second marriage, whose title to the barony depended on the illegitimacy of Henry Fenton Gardner. It was proved that Mrs. Gardner, his mother, the wife of the first marriage, left her husband's ship on the 30th January, 1802, that she did not again visit it, nor did Captain Gardner go ashore. The vessel sailed shortly afterwards to the West Indies, and he did not return to England until 11th July of the same year. On the 8th December following she was delivered of the claimant Henry Fenton Gardner. It was not, and indeed could not be pretended, that he was the fruit of an intercourse between Captain Gardner and his wife after the 11th July. If he was the issue of their marriage, he must have been the fruit of a sexual intercourse between them on or before the 30th January, and the gestation must have been of three hundred and eleven day's duration. Besides the fact that such gestation exceeded the ordinary period, the conduct of Mrs. Gardner, and her declarations connected with that conduct, afforded a very strong presumption against his legitimacy. The house of lords decided that the infant Allen Legge Gardner was the only son and heir male of

(s) Co. Litt. 123 b.

(t) Harg. Co. Litt. 123 b. n. 190\*.

(u) Ersk. Inst. book, 1, tit. 6, s. 50, p. 150;  
*Stewart v. McKeand*, Fac. Decision, No. 132,  
 Aug. 6, 1774, stated in Gardner case, 337—  
 42; Bankton, b. 1, tit. 2, s. 3; Routledge v.

*Carruthers*, 19 May, 1812, Fac. Coll. 4 Dow,  
 392; see case of *Sandy*, 2 Sess. R. 453;  
 post, 782.

(x) Co. Litt. 123 b; Cro. Jac. 541.

(y) 3 Br. C. C. 347.

(z) Gardner case, 286.

Captain Gardner, and had therefore established his claim to the barony, and consequently that Henry Fenton Gardner was illegitimate. The witnesses in support of the claim of Mr. Allen Legge Gardner all agreed that ten months or 280 days, is the ordinary period during which the mother bears the child previous to birth. The counsel for Henry Fenton Gardner entirely concurred in that, but they endeavoured by their evidence to controvert their proposition, that this period is invariable, that the rule is inflexible, that it is without exceptions, that it is impossible for the period of gestation to extend to 311 days, and in short, that a child born under the circumstances of this claimant cannot be legitimate. They maintained that if they could produce cases where the ordinary period of 280 days had been materially extended, any one case is evidence of the fact, in contradiction to all the theory and all the judgment of those, as the ground that no such instance had occurred, or by any possibility could occur. (a) The decision in this case was founded \*not exclusively [ \*732 ] on the ground that the alleged gestation for 311 days was [ \*732 ] contrary to the ordinary course of nature, but on that ground united with the other circumstantial evidence adduced in the cause. The utmost extent to which it prevailed was to form one, but not the only presumption against the legitimacy. The attorney-general, who in such cases offers reasons in the nature of a judgment, claimed the decision of the house that Henry Fenton Gardner was not the son of Captain Gardner on the following grounds:—"Here are 311 days which have elapsed from the period of separation of the husband and the wife to the birth of the child. I do not say that it is impossible he might be the father of the child, for to make use of an expression used by some of the witnesses, 'to know what is impossible in nature, I must know all nature:' but courts of justice do not speculate upon things which by possibility may exist; they proceed according to the evidence that is consistent with the ordinary and established rules of nature, and unless it can be shown in this particular case there was some reason for supposing that those established rules of nature had been deviated from, even if there were no evidence as to the conduct of the female, your lordships would hesitate before you came to the conclusion that this was the child of Captain Gardner; but why should you do so, when you find that within the ordinary period of gestation she was in the arms of an adulterer capable of begetting a child and she capable of bearing it? When you try this case by the test laid down by the counsel, you must establish a case free from any reasonable doubt; then I ask your lordships, on the part of the claimant, whether a case free from any reasonable doubt has been established?" (b) The decision was in favour of Allen Legge Gardner, and Lords Eldon and Gifford founded their opinions upon the whole evidence, for though there might be the possibility of the husband being the father upon the question of time, there was sufficient circumstantial evidence, of which the length of time no doubt formed part, to lead to the conclusion that he was not. It is clear the house decided on this ground; for Lord Eldon \*de- [ \*733 ]

(a) *Gardner case*, 239, 240, 246.(b) *Le Marchant's Rep.* pp. 326, 327.

by which consideration alone the physical impossibility could be proved, and proceeded upon all the evidence together, which satisfied his mind that the child was not the child of the husband.(c) One of the conclusions to be drawn from this case is that a limit to the period of gestation is not prescribed by the law of England. The conflicting evidence of the medical men in this case has occasioned a new controversy on this subject.(d)

(c) *Le Marchant's Gardner case*, pp. 331. *Surgical Journ.* 1827, vol. 27; *London Review*, No. 97; 5 *Good*, 160.

(d) See *Dr. Duncan's Edin. Med. and*

## [ \*734 ]

## CHAPTER VII.

OF THE CONFLICT BETWEEN THE LAWS OF ENGLAND AND SCOTLAND, WITH REGARD TO DIVORCE AND LEGITIMACY.

SECT. 1. Of Divorce  
2. Of Legitimacy

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## SECT. I.—OF DIVORCE.

*Law of Divorce in Scotland.*—THE law of marriage in Scotland has been considered in a former part of this work,(a) it remains only to take a general view of the law of divorce and of legitimacy in Scotland. Allusion has been already made to the great diversity which prevails in different countries with respect to the laws of divorce.(b) This contrast is very striking in the case of England and Scotland, for in the latter adultery and wilful desertion are sufficient grounds for dissolving the parties *a vinculo matrimonii*.(c) whilst the English law dispenses no such remedy except by the overruling power of a special act of parliament.(d) In Scotland the divorced parties may lawfully marry again with any other person not within the prohibited degrees of propinquity, the paramour excepted. But the marriage between the adulterer and adulteress is declared null, and the issue inabilitate to succeed to their parents.(e) But otherwise even the person guilty may marry again.(f) The canon law does not carry the restraint so far, it permits the adulterer, after the marriage is dissolved by the wife's death, to intermarry with the very woman with whom he was guilty, except in the special case where the adulterer had contrived and been accessory to the death of the wife.(g)

[ \*735 ] Wilful desertion is the second ground for the dissolution of a marriage by the law of Scotland, which provides(h)

(a) See ante, pp. 85—118.

(b) Ante, p. 366—369.

*Stair's Inst.* book 1, tit. 4, pt. 1, p. 26.

Ante — \*732—225

(f) *Stair's Inst.* book 1, tit. 4, s. 7; *Ersk. Inst.* book 1, tit. 6, s. 43.

(g) *Stair's Inst.* book 1, tit. 7, c. 6; *Ersk. Inst.*

"that the deserter, after four years wilful desertion without a reasonable cause, must be first pursued and decerned to adhere, and being thereupon denounced, and also by the church excommunicate, the commissaries are warranted to proceed to divorce." But the man's simple absence will not be accounted a wilful desertion, if he be following any lawful employment abroad, being content to accept and entertain his wife; for she is obliged to follow him wherever he is. The process against the *deserter* may be commenced one year after the desertion; but the decree of divorce cannot be pronounced till after the expiration of the four years. The court in the first instance will ordain adherence.<sup>(i)</sup> A wife obtained a decree of adherence, upon which she gave a charge to the defender, her husband, which was disobeyed; he was denounced, and the denunciation was recorded; she then presented a petition to the presbytery to proceed to the admonition and excommunication of her husband; the petition was refused, against which refusal she protested. She afterwards raised an action of divorce, in which the defender stated that he was ready and willing to adhere; it was held that it was incompetent and irrelevant in that action for the defender to offer to adhere to the pursuer.<sup>(j)</sup>

In general the pursuer is entitled to prove his libel in an action of divorce before any proof is had of *remissio*, but this may be different in special circumstances.<sup>(k)</sup>

The doctrine of recrimination as a bar to divorce in England has been already fully considered,<sup>(l)</sup> but in Scotland such a plea is not admitted.<sup>(m)</sup>

*Effect of Divorce.*—By divorce upon wilful non-adherence or desertion, the wife of the offending party loses the tocher and all claims for the provisions which are substituted for it; the husband, if guilty, not only forfeits the tocher, but \*all the provisions [ \*736 ] which would have been either legally or conventionally <sup>(n)</sup> due to the wife on his death.<sup>(n)</sup> On a divorce for adultery, the offending husband is allowed to retain the tocher,<sup>(o)</sup> but the woman, if guilty, forfeits not only the tocher, which is sunk in the communion, but her legal or conventional provision. If the divorce be at her instance, she is merely entitled to her legal or conventional provision as if the marriage had been dissolved by his death. As a conventional provision excludes a legal, so where an entail only allows a certain provision to a widow, she is not, though the divorce be at her instance, entitled, during the other's life, to more than the allowance under the entail.<sup>(p)</sup> Upon a divorce for impotency all things return

(i) 1 Stair's Inst. book 1, tit. 4, pl. 8, and note by Brodie, 29; Erskine's Principles of Law of Scotland, 85, 11th ed.

(j) *Murray or M'Lauchlan v. M'Lauchlan*, 1 Dunl. B. & M. 294.

(k) *Taylor*, 22 June, 1832, 10 S. D. B. 680.

(l) Ante, p. 439—444.

(m) *Warrender v. Warrender*, 14 Dunl. B. & M. 1099; Bell's Principles of Law of Scotland, 430; ante, p. 440, n. (g)

(n) Parl. 1573, c. 55.

(o) Erskine's Principles of Law of Scotland, 86, 11th ed.

(p) *Anderson v. Welsh*, 8 Feb. 1734, Mor. 333; *Justice v. Murray*, 13 Jan. 1761, Mor. 334; *Cunningham v. Fairlie*, 15 June, 1819, Fac. Coll.; 1 Stair's Inst. by Brodie, 41, n. a. As to the wife's allowance after divorce, see *Aitkin v. Greenhill*, 4 Shaw & D. 474; *Greenhill v. Aitkin*, ib. 473; *Elgin v. Ferguson*, 5 S. & D. 243.



to the same condition as before the marriage, because in effect there was no marriage.(q)

*Cruelty a ground of Separation.*—A husband may, without assigning any reason, remove his wife from his family, though he is still bound to maintain her. But a wife can have no claim against her husband if she voluntarily withdraw from him; and therefore her remedy on maltreatment is a judicial separation.(r) *Sævitia* or maltreatment, which may be carried to such an excess as to become nearly as immoral and hurtful to society as adultery, is only a ground of divorce *a mensa et thoro* in Scotland as well as England, even in the most extreme cases.(s) If the wife succeed in obtaining a judicial separation, the court of session will order her aliment suitable to the rank and circumstances of her husband. The difficulty in these cases is to determine what shall amount to ill treatment in the eye of the law, the decisions on this subject are too limited to afford any specific [ \*737 ] rules. It is against the first principles of marriage to allow \*light matters to constitute the ground for judicial separation. It is only when matters have arrived at some great extremity that a court of justice can interfere. In an early Scotch case(t) the grounds of the decree were, that the husband had shut the lady out all night, had denied her the superintendence of her daughter's education, and had open scandalous conversation with her servant, whom he protected when charged with her crime. When however the parties live unhappily, they may enter into a contract of separation, which courts of law will carry into effect until they are revoked: Where no such contract has been entered into, but the parties have merely chosen to live apart, an action for aliment at the suit of the wife is incompetent.(u) When the husband had granted an annuity to his wife under a voluntary contract of separation, and heritably secured it while solvent, there being no suspicion of fraud, the annuity was found not to be reducible by his creditors while the separation continued.(x)

*In granting Divorces Collusion guarded against.*—The law dispenses the remedy by divorce with an unwilling hand, as is manifest in the whole proceedings. A jealous anxiety to disregard every admission marks every step. Hence no judgment passes by default without proof; and if the defendant declines to appear, the court are nevertheless bound to proceed with the same formality as if he were present and had maintained the keenest opposition.(y)

In actions of divorce, whether between natives or foreigners, there must be no collusion between the pursuer and the defender, either established by direct evidence, or necessarily arising out of the circumstances of the case; that there must not appear the slightest indication of an improper understanding between them, or any want of complete bona fides when founding on the wrongs committed within Scotland as a ground for divorce.(z)

(q) *Earl of Eglinton v. Lady Eglinton*, 14 July, 1610, Mor. 6185; *Stair's Inst.* book 1, tit. 4, pl. 20.

(r) *Stair's Inst.* by Brodie, p. 42, note.

(s) *Rep. of Gordon v. Pye*, p. 23; *Ferg. R.* 300.

*ness of Gordon v. Duke of Gordon*,

8 June, 1697, Mor. 5902.

(u) *Bell v. Bell*, 22 Feb. 1812, *Fac. Coll.*

(x) *McGregor's Trustees v. McGregor*, 22 Jan. 1820, *Fac. Coll.*

(y) *Gordon v. Pye*, 4to. *Fer. R.* 317.

(z) *Ferg. Rep.* 408.

The plain principles on which what is called collusion vitiates a title to sue is, that the pursuer has been participant of \*the wrongs complained of, by instigating it, or connivance [ \*738 ] with the perpetration of it, for the sake of the remedy sought after, or some bye purpose. In this view it is obvious, that, though a married person should commit adultery in Scotland, in a way and manner calculated for detection by the innocent party, from the private expectation that such party would thereby be induced to seek the legal remedy of divorce, this could form no sort of objection to the title and interest of the innocent party to demand that remedy. This being the case with natives, foreigners cannot be in a less favourable situation. The purpose of the foreigner in choosing Scotland as the scene for the violation of his marriage vows, cannot disable the innocent party from claiming that redress which the law of Scotland affords for such a wrong. Such party having neither suggested the manner nor furnished the means of perpetration, nor refrained from using means to prevent it, may surely, with a pure and good conscience, claim the redress afforded by law, though more ample than that afforded by the law of his own country, and of course more desired.(a) In all actions of divorce, whether on adultery or wilful desertion, the pursuer must swear that the action is not carried on by collusion ;(b) otherwise parties, contrary to the first law of marriage, might at pleasure disengage themselves from that sacred tie by their own consent. Upon this ground voluntary cohabitation by the injured party, with knowledge of the acts of adultery committed by the other party, imports forgiveness, and will be a bar to an action of divorce for such acts.(c) Proof of collusion, not adduced till after the decree of divorce, will not have the effect of setting aside the prior decree of divorce, but it ought to \*save the interest [ \*739 ] of creditors from being affected by such collusive decrees, so as not to put the wife in immediate possession of her terce or jointure.(d) A wife brought an action of divorce on the ground of adultery against her husband, which was opposed by the trustee for his creditors, so far as related to the pecuniary consequences ; the wife emitted an oath *de calumnia*, and denied collusion ; whereupon the trustee offered a proof of collusion ; and the guilt of the husband was established ; it was held that the proof offered by the trustee after the oath of calumny was incompetent ; and that the wife was entitled to a decree of divorce in the usual terms, without any qualification as to the right of the creditors of the husband.(d)

*Jurisdiction as to Divorce.*—We have already seen that all actions as to marriage, legitimacy, and divorce, formerly vested in the

(a) Lord Meadowbank's note in *Ullerton v. Tewsh*, and in *Hillary v. Hillary*, pp. 94, 95, 4to. Ferg. Rep. 61—63.

(b) The formula of the oath of calumny which is administered embraces the following points:—"Compeared A. B. pursuer, who, &c. deposes that there has been no concert or collusion between him and the said defender, in raising this action, in order to obtain a divorce against her, nor does he know, believe, or suspect that there has been any concert or agreement between any other person

on his behalf and the said defender, or any other person on her behalf, with a view or for the purpose of obtaining such divorce, all which is truth, as the deponent shall answer to God."—Ferg. Rep. 363. See *idem*, 364. 376. 51. 233.

(c) Watson Mor. Dict. 330 ; Ersk. Inst. b. i. tit. 6, pl. 43.

(e) Erskine's Inst. book 1, tit. 6, pl. 45.

(d) Greenhill, 7 Feb. 1822 ; 1 S. & 296 ; 2 Shaw's Appeal Cases, 425.

Commissary Court of Scotland, have been transferred from that court to the Court of Session, subject to ultimate revision by the house of lords.(e) The house of lords in such cases sits as a Scottish Court of appeal, and as such they must be guided by a reference to the principles of the law of that country, and not by the application of the principles of English law, where it cannot be applied consistently with the principles of the law of Scotland.(f)

A question was raised whether, in an action of divorce, at a husband's instance, the account incurred by the wife to her law agent, should be taxed against the husband, as between agent and client.(g)

*Action of Divorce a personal Cause of Complaint.*—The action of divorce is of the nature of a pure personal cause of complaint, which neither the public nor any third party, upon even the strongest ground of patrimonial interest, will be allowed to plead. Divorce is no public vindication of the law but a private remedy merely, and for private purposes. It is a remedy which the injured party only can [ \*740 ] seek; and if that party is willing to abstain from demanding it, the marriage will still subsist, and the rights and privileges of the parties will remain the same, just as if the adultery had never been committed.(h) The right of divorce is of a civil nature and a personal privilege, and is competent only to the married parties; it can neither be transferred by them to another, or interfered with by any third parties, whether private individuals, or such as are effectually vested with the right of prosecution in matters connected with the criminal department.(i)

*General Observations on the Jurisdiction exercised by the Scotch Courts in Dissolving Foreign Marriages.*—We now proceed to the most important class of cases, involving an issue of the highest possible interest to all the subjects of the British empire: The points at issue have received much solemn and deliberate discussion, on the numerous questions which have arisen as to the jurisdiction of the courts of Scotland to dissolve marriages, either actually contracted in England, or at least between parties who, though married in Scotland during a transient visit made for that single purpose, were at the time truly and substantially domiciled in England.

According to the decisions of the Scotch courts, the municipal law of Scotland is applied in dissolving marriages *à vinculo* in all cases without distinction, whether the parties are foreigners or domiciled subjects and citizens of Scotland; whether, when foreign, the law of their own country affords the same remedy or not, and whether they have contracted their marriage within that realm or in any other; provided only that they have become properly amenable to the jurisdiction of the Scotch *forum*. None of these last mentioned cases, nor

(e) Ante, p. 117.

(f) *Warrender v. Warrender*, 2 Clark & Finn. 560, 561; *Macneil v. Macgregor*, 2 Bligh, N. S. 490.

(g) *Taylor v. Taylor*, 10 Shaw D. & B. 18.

(h) *Gordon v. Pye*, p. 38, Forg. Rep. 351.

(i) "*Personalia autem sunt non ea tantum, quæ uni certis personis data sed et quæ*

*tati certarum personarum generi, generali lege concessa. Quæcumque autem privilegiis sunt personalia, illa nec cessione juris aut actionis in aliam possunt personam transferri; cum eâ ratione personam egrederentur, contra concedentis intentionem.*"—Voet. lib. 24, tit. 2, ss. 6, 8; lib. 48, tit. 5, s. 21; lib. 1, tit. 4, ss. 12, 13.

ceed any other from Scotland, in which a question of international law could be raised for trial and judgment, having hitherto been appealed, (with the exception of *Warrender's* [ \*741 ] case, (j) the rule has for a period of more than twenty years stood as established by them, and the subsequent practice has furnished additional instances of its application. (k)

Fergusson observes:—The decisions of the Scotch courts, that the mere presence of the defender within Scotland, and the fact of consensual infidelity, are sufficient both to found jurisdiction over a foreigner by affording opportunity for personal citation, and to authorize the dissolution of a foreign marriage by decree of divorce, evidently demonstrate that unless the remedy in the judicature of Scotland shall be limited either to that which the *lex loci contractus* affords, or to that which the *lex domicilii*, taken in the same fair sense as in questions of succession might give, the public decrees of the only court of Scotland, which is competent to pronounce one in such consistorial causes, become proclamations to invite all the married who chafe to be free, not in the rest of the British empire alone, but in all countries where marriage is indissoluble by judicial sentence, to seek that object in this tribunal. Adultery and presence within the Scotch territory are the only requisites to found the jurisdiction by citation. What number of foreign parties may accept such an offer, and may even commit the crime there for the very purpose of affording ground for the action, it is impossible to conjecture. But it is manifest that, in exact proportion to their number, injury to the morals of that country must follow; and, by setting at nought the laws of other nations, reproach must be brought upon their own. For all foreign parties, while matters stand upon this footing, have it in their power, with the help of evidence, as easily provided as it may be disgusting and impure, to oblige the Scotch Consistorial Court (now Court of Session) to entertain the whole mass of their foreign causes, although there is no fair interest to insist that the municipal law of Scotland shall decide these by its own peculiar rules. To what extent, therefore, the good order of society may eventually be disturbed by this compulsory abuse and pollution of its jurisdiction, the consequence of the doubts and contests that must ensue as to rights of legitimacy and succession, no calculation can be made." (l) [ \*742 ]

The evils here enumerated will for the most part be confined to Scotland, unless foreign countries shall hold the Scotch decree of divorce binding upon the parties when they return to their native country.

*To what extent Lex Loci Contractus prevails.*—The main ground taken by the English courts is, that an English marriage is by its nature indissoluble, and that as the *lex loci contractus* regulates other contracts it ought this. The question therefore is, whether or not in question of *status*, or that particular relation in domestic life which arises from the matrimonial union, the law of the domicile shall prevail or the law of the contract? We have already observed that the

(j) *Clark & Finn*. 448.

(k) *Fergusson*, cited 2 *Clark & Finn*. 556.

(l) *Fergusson's Rep. Intro.* 18, 19.

general principle is, that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts.<sup>(m)</sup> An English contract, the subject of decision in a Scotch court, must be tried by reference to the law of the country where the contract had its origin. The principle, that a contracting party shall not be able to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed, is very generally adopted by the Scotch courts. Thus in *Mitchell v. Mowatt*,<sup>(n)</sup> the custom of Holland prevailed over the law of Scotland, with reference to a Dutch factor's right of retaining goods on the security of which he had given credit. In *Lawson v. Maxwell*,<sup>(o)</sup> a surgeon's privilege, recognized by the law of Scotland, to be paid in preference to the other creditors of a patient, was rejected, because it was not acknowledged by the law of England, under which the debt had been contracted. In *Campbell v. Ramsay*,<sup>(p)</sup> interest at the rate of 8l. per cent. was recovered on a bond granted in India, although the transaction was usurious by the law [ \*743 ] of Scotland. Although the rule as to the *lex loci contractus* is \*of very general application, particularly as to the constitution and validity of personal contracts and obligations, it is not universal. In the first place it does not apply to contracts or obligations relative to real estates. In the second place, no regard is paid to the *lex loci* where it appears that the parties had a different law in view at the time they entered into the contract.<sup>(q)</sup> So also the *lex loci* is disregarded in those cases in which it is contrary to the general and universal rules of justice,<sup>(r)</sup> and where its application would be opposed to the religion, morality, or municipal institutions of the country in which it is sought to be enforced.<sup>(s)</sup> The rule of the *lex loci contractus* unquestionably applying to the constitution of marriage, the question is, whether a different rule can be adopted with consistency as to the dissolution of the contract of marriage? Or can the rule as to the dissolution of marriage be modified and controlled by an arbitrary change of domicile at the will of either or both of the parties? Lord Brougham said, that although the English jurisprudence adopts the principle, that a marriage good by the laws of one country is held good in all others where the question of its validity may arise, they would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. "Thus we should expect that the Spanish and Portuguese courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our courts would refuse to sanction, and would avoid by a sentence, a marriage between those relatives contracted in the Peninsula under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*,

(m) Ante, pp. 120—123.

(n) Lord Kilkerran's Rep. 11th Decemb. 1746; Ferg. Rep. 85.

(o) Fac. Coll. 12th Feb. 1784; Ferg. Rep.

6.

(p) Fac. Coll. 15th Feb. 1809; Ferg. Rep.

86.

(q) *Robinson v. Bland*, 1 W. Bl. 259.

(r) Ferg. Rep. 394. 396.

(s) Ante, pp. 126. 130.

and incapable of being set aside by any proceedings in that country."<sup>(1)</sup>

It cannot be deemed irrelevant to state the general reasoning which has been urged on the one hand in favour of the *lex loci contractus*, and on the other of the law of the domicile of the parties. It should be observed that those observations \*were made in a case where both the parties were natives of [ \*744 ] England, had regularly married according to the forms prescribed by that country, which was their domicile of residence, but the defender had resided forty days in Scotland, where adultery was committed, and was personally cited in an action of divorce.<sup>(u)</sup> No doubt was entertained of the jurisdiction, had the parties been Scotch and married in Scotland, but the doubt arose on account of the parties being foreigners, married in a kingdom where the marriage contract is indissoluble by judicial sentence.

*Argument in Favour of Lex Loci Contractus.*—In ordinary cases of civil obligations of a pecuniary nature, the application of the *lex loci contractus* is undoubted. In like manner, in the constitution at least of contracts involving matrimonial status the same rule unquestionably applies; for every one knows that, by the law of nations, marriage duly celebrated according to the law of the place where made, is valid and effectual all the world over.<sup>(x)</sup> But in judging of the effects of the marriage contract, and in defining the rights which it confers on either party, it has been said that these must be modified and controlled by the various changes which may afterwards take place in the domicile of the offending party.

It has been urged that the unqualified admission of such an arbitrary rule of decision, is pregnant with the most serious mischief to marriage, the most important of all the relations of society. If, for instance, the temporary residence of a party coming from England for more than forty days were to constitute the rule for determining the question of matrimonial status, the marriage state, contrary to its very essence and nature, would be rendered loose and unsettled, by being made subservient to the capricious views of the married pair, as often as they inclined to move from one country to another. In particular, the English marriage contract, which is sacred and inviolable, might be subverted at the will of either of the parties who chose to come to Scotland for a residence of merely forty days, or even of one day, if served with a personal \*citation; and [ \*745 ] thus an unjustifiable temptation would be held out to married persons, not only to violate their sacred vows and engagements, and, with them, all the important legal provisions dependent upon them, but also to commit openly a fraud upon the law of their proper domicile. These consequences, which are far from being imaginary, must inevitably follow, were the mere transient residence of the parties to afford the rule of decision; and although perhaps, from the less frequent changes which would then occur, they might not exist in the same distressing degree, if a more permanent domicile were required, nevertheless it has been apprehended that even then they

(1) 2 Clark & Finn. 531.

(u) *Gordon v. Pys*, 4to. Ferg. R. 276.

See 1 Burge on Foreign Law, 680—693.

(x) Ante, p. 123—125.

must still take place to an extent sufficiently alarming, in every case where the domicile happens to run counter to the agreement of parties, and to the *lex loci contractus*. In these circumstances, and looking to such extraordinary and inconsistent results, with a degree of alarm, it has been thought that any principle which is to lead to them cannot be correctly applied. It will be necessary, therefore, to have recourse to some other principle, and it is contended that in a question of matrimonial *status*, even more than in any other question, none can be safer or more expedient than the *lex loci contractus*. The relation constituted by marriage is unquestionably the most sacred and important of all the relations in civil society, and that which it most concerns the citizens of every state should be fixed and determined. If, therefore, the principle of *comitas*, or concession by one foreign state to another, is at all to be admitted, it seems impossible to imagine a case which calls more loudly for its application than the case of marriage. Upon just and enlightened views of international jurisprudence, the Scotch courts every day give effect to other ordinary foreign contracts, and to all their adjuncts and qualities; and why this should be denied to civil questions, affecting either the rights, or the *status personarum*, arising out of the relation constituted by the marriage contract, cannot be easily comprehended. If the mode of constituting the relation, as well as the relation itself, is received, the consistency of not receiving at the same time the modifications of it cannot be perceived. By analogy, clearly the

[ \*746 ] principle of *comitas* \*should be extended thus far; and accordingly it is expressly so laid down by Huber, who, after stating that marriage, if lawful in the place where it is contracted and celebrated, will be valid and effectual every where, distinctly adds, *Porro non tantum ipsi contractus ipsæque nuptiæ, certis locis rite celebratæ, ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta ubique vim suam obtinebunt.*(y) It is by a strict adherence to this principle alone that the numerous and important rights and interests dependent upon marriage are to be maintained. Whenever, therefore, a contract, or *quasi* contract, intervenes, it ought to be the governing rule, although the parties may happen, from motives of choice or necessity, to have subsequently changed the place of their residence. Once lawfully executed, there appears to be the strongest reason, in justice and expediency, to uphold the contract according to the original intention of the parties, and the express stipulation of their agreement. It is the duty of the parties contracting to perform their respective stipulations; and it is the duty of courts of law to enforce that performance, where it is attempted by either party to be evaded. As, therefore, in the present case, the parties have voluntarily contracted an indissoluble agreement, indefeasible in its own nature, and by the law of the country where it was made, it does not appear that the Scotch court, in judging between those parties, can competently invert that agreement, or impose upon them rules and regulations which they never contemplated, for which no provisions is made, either by their

(y) Huber, De Conflictu Legum, s. 9.

contract or by the law of England, and for which no effectual provision can be made by the law of Scotland. In a word, in every case of civil right between parties, and more especially in a case originating in a marriage contract, the legal contract of these parties is the surest and most unerring guide by which a court of law can walk; and, if possible, the conditions of the contract ought never to be departed from. It was further contended, from several other considerations, "that there is nothing to induce a court of justice to depart from a general \*rule of acknowledged utility, [ \*747 ] or to prevent it from judging in the case of a marriage contract, as in every other question arising from a civil contract executed abroad, according to the law of the place in which it was executed, and in contemplation of which the agreement was made. Neither the general policy nor the manners of Scotland can require that such a sacrifice should be made to them, as that the Scotch court should assume to itself the power of dissolving an union, which by the laws and religion of the country where it was celebrated is accounted sacred and inviolable; which even in Scotland, though not in the same degree, is nevertheless, in relation to its duration, regarded with so much veneration, that every attempt to infringe upon it is watched with a jealous vigilance, and every judgment dissolving it pronounced with an evident reluctance." (z)

*Argument in favour of the Law of the Domicile.*—It has been powerfully argued on the other side, that in all questions involving the consideration of *status*, neither the private agreement of the parties, nor the law of the country in which the relation was constituted, can control or stand in the way of the law of the domicile at the period of commencing the action. The following observations of a learned Scottish Judge, upon the rule of divorce, are deserving of attention:—"It must be admitted that in every country the laws relative to divorce are considered as of the utmost importance, as public laws affecting the dearest interests of society. With us the laws relative to divorce are founded on divine authority. How can a person withdraw himself from obedience to such laws? Are these laws relaxed as to a person domiciled in Scotland, because his marriage is contracted in a country where the law of divorce is different? If two natives of Scotland were married in France or Prussia, according to the laws of those countries, the marriage will no doubt be valid here, but would they be entitled to come into the commissary court, and insist for a dissolution *a vinculo matrimonii*, merely because their tempers were not suitable, \*which in France was ground [ \*748 ] of a divorce, or for any of the numberless reasons for dissolving a marriage which are allowed by the laws of Prussia. But if we would not listen to the *lex loci* when it facilitates divorce to a degree which our law considers as inconsistent with the best interests of society, and as not warranted by the divine law, on what principle are we to give effect to the *lex loci* which prohibits divorce, even *adulterii causa*, though permitted in this country under the sanction

(z) Mr. Commissary Tod's Opinion in *Gordon v. Pye*, 4to, p. 33—35; 38; *Ferg. Rep.* p. 311—318.



of the divine law." The same learned judge concluded his argument by saying,—“In short, although a marriage which is contracted according to the *lex loci* will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties, yet many of the rights, duties and obligations arising from it are so important to the best interests of morality and good government, that the parties have no control over them, but they are regulated and enforced by the public law, which is imperative on all who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstance that the marriage was celebrated in a country where the law is different. In expounding or enforcing a contract entered into in a foreign country, and executed according to the laws of that country, regard will be paid to the *lex loci*, as the contract is evidence that the parties had in view the law of the country, and meant to be bound by it; but a party who is domiciled in Scotland cannot be permitted to import into that country a law peculiar to his own case, and which is in opposition to those great and important public laws, which the Scotch legislature has held to be essentially connected with the best interests of society.”(a)

Mr. Commissary Fergusson observed,—“It is in each state obviously the safest and most natural course to follow the rules of its own system in enforcing performance or giving redress between foreigners for breach of the duties of those relations, which are *juris gentium*, committed within its own territory; because it is not to be presumed that courts of justice are fully acquainted with any code [ \*749 ] but that of their own land, and if they were bound to prefer to it that of the country from which each foreign party comes, who is cited before them, it would follow, that in all such cases they must seek their information from foreign lawyers; and according to that information must form separate rules of judgment for the inhabitants of each state who may be convened before their tribunals. That they should do so is indeed necessary when the question is, whether the relation or contract itself has really been constituted abroad; because this must be judged of *secundum legem loci contractus*.”(b)

The Lord Justice Clerk maintained that no private agreement or convention of parties could affect the rights resulting from the relation of marriage. That it was equally clear, that parties who have contracted the relation of marriage in a foreign country, when they take up their residence in Scotland, must have their rights regulated by the law of that country and not by that of the foreign state. It would be strange indeed if a Scotch man and woman, married at Berlin by a regular clergyman of that protestant country, and according to the forms of its church, should, on their return to Scotland, be entitled to maintain that their rights, particularly in reference to divorce, must be regulated not by the laws of Scotland, but by those of the Frederician code, and that either party might sue for divorce in the Scotch court on the endless variety of whimsical and absurd

(a) Lord Robertson, Ferg. Rep. 398—  
“15.

(b) Gordon v. Pye, 4to. Rep. 71.

grounds contained in it. But it has been said, that a contrary doctrine would lead to English or Scottish marriages being dissoluble in France or Prussia on the endless variety of grounds there permitted; (c) the consequences of which would be most pernicious. That view is apprehended to be incorrect, because the Scotch right to divorce *a vinculo matrimonii* for adultery, and the limited divorce *a mensa et thoro* in England, as well as the total dissolution by act of parliament, proceed entirely on the absolute breach of the contract or bond of marriage. In so far, therefore, as a divorce obtained in another country does not proceed on that basis, it by no means follows that it could or ought to have \*effect either in Scot- [ \*750 ] land or in England, as such divorces are avowedly permitted on grounds wholly different from the actual rupture of the contract. The Scotch could admit the validity of the Prussian marriage, but as to the rights of parties arising from it, or wrongs committed by either of them, the Scotch would deal with them according to their own law. Viewing marriage only in the light of an ordinary civil contract, and holding that there has been a total violation and annihilation of it by one of the parties, it does not follow, on any fair principle of international law, that the remedy for that wrong, or the species of *actio injuriarum*, that is founded on it in the Scotch action of divorce, ought entirely to be regulated by what would be the remedy in the place of the contract; for it is well known, that in the case of an ordinary action of debt or obligation, or action for breach of contract, redress, when sued for in Scotland, will be afforded according to Scotch law, and not according to that of England, quoad execution and diligence. (d)

Lord Meadowbank, in giving an opinion differing from the commissaries, urged that the position, that it is a condition of the contract that the marriage was to be *indissoluble*, is not proved by the only circumstance urged in favour of the doctrine, viz. that the law of England does not commit to any court of justice authority to divorce *a vinculo matrimonii*. By marrying in England, parties do not become bound to reside forever in England, or to treat one another in every other country where they may reside according to the provision of the law of England. Their obligation is to fulfil the duties of husband and wife to each other, in whatsoever country they may be called to in the course of Providence; and they neither promise, nor have power to engage, that they shall carry the law of England along with them, to regulate what the duties and powers are which they shall fulfil and exercise, or the redress which the violation of those duties, or abuse of those powers may entitle to. All of these functions belong to the law of the country where they may eventually reside, and to which they unquestionably contract the duties of obedience \*and subjection whenever they enter its territo- [ \*751 ] ries. (e) And further, this supposed condition, even if it had the will of the parties in favour of it by any stipulation, however express, could derive no force from that circumstance. It is too obvious to

(c) See Prussian Code published at Berlin, 1795; vol. 3, p. 84, s. 668. 739; Ferg. Rep. p. 448. 454.

(d) Ferg. Rep. 414. 416.

(e) See Lord Brougham's observations on this subject in *Warrender v. Warrender*, 2 Clark & Finn. 635.

admit of doubt, that no quality can be created in the relation of husband and wife by positive or implied agreement. The Scotch courts would not dismiss an action of divorce because the parties at intermarrying had in the most formal manner renounced the benefit of it, and become bound that their marriage should be indissoluble. Nor would it be any objection to a divorce at the instance of a Roman Catholic, that his marriage was to him a sacrament, and therefore by its own nature indissoluble. These are all *pacta privatorum*, and cannot impede or embarrass the steady uniform course of the *jus publicum*, which, with regard to the rights and obligations of individuals affected by the three great domestic relations, enacts them from motives of political expediency and public morality, and nowise considers them as private benefits, resulting from agreements concerning *meum et tuum*, which are capable of being modified and renounced at pleasure. Accordingly the case of Campbell of Carrick, in rejecting the competency of any personal objection to bar a pursuer of declarator of marriage, establishes by the highest authority the incompetency and inefficiency of any obligations, not sanctioned by the common law, to operate on matrimonial rights. It is obvious that personal objections in bar of actions must have lain, could the benefits claimed be either modified or renounced by the agreement or deeds of parties.

But if this supposed condition can derive no force from the will of the parties, it seems palpably impossible that it should derive any from dicta of municipal law, where the relation originated, so as to give it efficacy *ultra territorium* where *jus dicenti impune non paretur*. In the fulfilment of ordinary contracts, as to *meum et tuum* the *lex loci contractus* forms implied conditions of the contracts, and is accordingly adopted abroad, as furnishing the means of construing them [ \*752 ] \*aright. But this is merely a proceeding in execution of the will of the parties, and not in the least a recognition of the authority of a foreign law. The case therefore is quite different where the will of the parties only constitutes, and does not modify, the relation or its rights; and where of course the municipal law, deriving nothing from stipulation or agreement, is merely the positive institution of the sovereign, and cannot direct the decisions of foreign courts on circumstances occurring within their own jurisdiction. But it is said that, in the case of this defender, who is domiciled within the imperium of the law of England, as his personal succession wherever situated would be regulated by that law, his matrimonial obligations, and the redress of wrongs relative to them, ought to be regulated by the same law. But it is to be observed that, in questions of succession, the *lex domicilii* regulates: because as the right of testing by a positive declaration of will is recognized *jure gentium*, the presumed will of a defunct is also to be enforced by the same law, and that will must be gathered from the rules of intestate succession in his own country, which he probably intended should regulate its descent. Matrimonial rights and obligations, on the contrary, so far as *jure gentium* admit of no modification by the will of parties, and foreign courts are therefore, nowise called upon to inquire after that will, or after any municipal law to which it may correspond. They are bound to look to their own law, and it is with all deference thought

to be in a particular degree contrary to principle to make that law bend to the dictates of a foreign law, in the administration of that department of internal jurisprudence which operates directly on public morals and domestic manners. The very same principles which prescribe to nations the administration of their own criminal law, appear to require a like exclusive administration of law relative to the domestic relations. Hence in both England and Scotland, the most regular constitution abroad of domestic slavery, (g) was held to \*afford no claim to domestic service in this country, though [ \*753 ] restricted for only such service, and under such domestic authority as our law recognized. The whole order of society would be disjointed, were the positive institutions of foreign nations concerning the domestic relations, and the capacities of persons regarding them, admitted to operate universally, and form privileged casts, living each under separate laws, like the barbarous nations during many centuries after their settlement in the Roman Empire. (h)

It has been submitted by a modern author, that neither the *lex loci contractus*, nor the law of the country in which there has been only such a temporary residence as enables a party to sustain a suit, ought to be adopted, but that the appropriate law by which the dissolubility of marriage is to be determined, is that of the actual domicile. (i)

Having stated some of the general arguments which have been adduced against and in favour of the jurisdiction of the Scotch courts, we now proceed to the precise issues which have been considered in the various cases which have occurred on this subject.

1. *Both Parties Scotch, Marriage in England, domicile always in Scotland.*—A marriage contracted in England between Scotch parties, whose domicile was properly in Scotland at the time of marriage, and who afterwards returned, and did actually reside in Scotland, may be dissolved by sentence of divorce in the courts of Scotland. In *Edmondstone v. Lockhart*, (k) both parties were of Scotch families, and born and educated in Scotland. The pursuer entered into the army, and was on foreign service, but afterwards retired, and settled in his native country. Having at a subsequent period of his life, obtained a company in the Scotch militia regiment of his own county of Lanark, he was stationed with that \*corps in England, and was [ \*754 ] then married in 1805, according to the English ritual, to the defender, who was sister of the commanding officer, and resided at the time in his family. In contemplation of that marriage, the pursuer's resignation had been previously proposed to the colonel of the regiment and had been accepted. An antenuptial contract had

(g) In the case of *Somerset* it was decided that a heathen negro slave, when brought into England, owes no service to his master, 11 St. Tr. 340; 20 Howell's St. Tr. 70; Lofft's Rep. 1; 1 Ld. Raym. 146; 2 B. & C. 448; *Knight v. Wedderburn*, 15 Jan. 1778, Mor. Dict. Dec. 14, 545, in which all effect was denied to the relation between the master and slave or obligation of service for life, although perfectly warranted by the law of the British colony from which

the parties had come, on the clear and obvious principle, not only of the injustice of the contract, but its repugnance to the laws and institutions of Scotland. See *Case of Slave Grace*, 2 Hagg. Adm. R. 94. *Williams v. Brown*, 3 Bos. & Pull. 69.

(h) Lord Meadowbank in *Rep. Gordon v. Pye*, 4to. p. 86. 90. Ferg. Rep. 357—362.

(i) 1 Burge on Fo. Law, 680. 688.

(k) Ferg. Rep. 168—208. 463; *Faa.* 1 June, 1816.

also been executed in the Scotch form, relative to the patrimonial concerns of the parties, and for eight years they cohabited together as husband and wife in Scotland, on a farm granted on lease to the pursuer by the defender's brother. But the pursuer accused her of having there entered into an adulterous connection with one of his servants. Against his action of divorce she pleaded in defence that her marriage having been celebrated under the English law, was indissoluble by judicial sentence. In this case it was established by evidence that the only domicile of both parties was in Scotland at the date of the action—indeed, that during their whole lives, both had been citizens and subjects of that country. If the law of the defender's real domicile should govern the decision in such cases, no doubt therefore could exist that the usual conclusion of the Scotch action for divorce *a vinculo matrimonii* must be sustained. This was held to be the universal rule. At the same time, all the circumstances relative to the particular contract of these parties, except the place of its date, and all the general considerations of justice and expediency on which the principles of international law were founded, likewise led to that result. This case was seriously contested, and at the close of the discussion, when the court came to decide, two of the judges in the primary court were of opinion that the conclusions and allegations of the pursuer ought to be sustained as relevant. The other two judges of the same court were of opinion that this was an extreme case against the law of the contract, but that nevertheless the English rule ought to be preferred. By the rule of the court in case of equality, judgment was given for the defender as follows:—"In respect it is admitted, that their marriage was regularly solemnized in England, found, that neither the alleged domicile of the parties in Scotland, nor the alleged commission of adultery there by the defender, can have [ \*755 ] the effect of \*altering the condition of the contract between the parties as indissoluble *secundum legem loci contractus*, so as to authorise that court to pronounce sentence of divorce *a vinculo matrimonii*." Application was made to the court of session for a review of this judgment, and it was remitted to the commissaries with instructions "to alter the interlocutor complained of, to sustain the action, and proceed therein according to law." The judicial proceedings in this case were ultimately terminated by an extrajudicial compromise between the parties.

2. *Husband only a native of Scotland, Residence in England, but Scotch Domicile.*—The Scotch courts have jurisdiction to entertain suits for dissolving marriages where the husband only is a native of Scotland, although the parties should have latterly resided principally in England, but in fact had a Scotch domicile.

In the discussion which took place in the house of lords in the case of *Tovey v. Lindsay*, the doctrine of the absolute indissolubility of an English marriage, except by act of parliament, was incidentally argued on an appeal against the decision in Scotland dissolving an English marriage celebrated at Gibraltar, which place is held to be under the law of England. The opinion of Lord Eldon, C., and Lord Redesdale, were unfavourable to the power or competency of the Scotch courts to pronounce decrees of divorce *a vinculo* of English marriages.

In this case the husband was born in Scotland where he remained chiefly until he went with his regiment to Gibraltar in the year 1781; at that place he was married by the chaplain of the regiment, according to the rites of the church of England to a native of England. Up to the year 1792 it was admitted that respondent's domicile was in Scotland, in that year he removed with his family to Durham, for the purpose, as stated, of the education of his children. The husband having sold out of the army in 1794, procured an appointment in the commissariat department, in which he still remained as deputy commissary general. During this period he was occasionally absent on duty in various places, but his family remained at Durham, where he joined it as often as he had an opportunity. In 1802, a misunderstanding having arisen between him and his wife, they [ \*756 ] agreed to separate; and a deed of separation according to the law of England was executed, by which he agreed to pay to her trustees an annuity for her life, whether married or sole. The husband raised an action against the wife before the commissaries of Edinburgh for a divorce on the ground of adultery, which was accordingly decreed. The wife contended that she resided in England, and was separated from her husband under an English deed of separation, and that as the marriage took place abroad within the pale of the English law, the *locus contractus* was quite out of the question. The husband insisted that he was born and domiciled in Scotland, that it was a Scotch marriage, and that the deed of separation was no bar to the suit. Considering the great importance of the question, and the very serious effect that the decision might have upon the civil relations of families, and even upon questions of property, Lords Eldon and Redesdale thought the best step that could be then taken would be to desire the court below to review its own decision, and the cause was remitted for further consideration. The death, however, of the husband shortly after the case was returned to the court of session, put an end to all further proceedings.<sup>(l)</sup> Lord Redesdale observed, according to the principles of the Scotch court any one from any quarter may go and establish a domicile in Scotland and by that means, even in the face of a deed of separation, draw his wife to a Scotch forum and proceed against her for an absolute dissolution of the marriage. If this should prevail, any person had it in his power to alter the nature of his most solemn engagements. The wife might say that such was not her contract; and if this be not held a sufficient answer, the Scotch courts may, on the same principle, judge all other contracts by their own law, as well as that of marriage. It appears contrary to justice that one party should be able at his option to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed.<sup>(m)</sup>

\*In *Warrender v. Warrender*(n) the principal question [ \*757 ] was, whether the Scottish Courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in

(l) *Tovey v. Lindsey*, 1 Dow, 117; *Fergusson v. Fergusson*, 1 Dow, 140. Rep. 265. See 2 Clark & Finn. 565. (n) 2 Clark & Finn. 488; 9 Bligh, 80.

(m) Lord Redesdale, in *Tovey v. Lindsey*.

England, according to the law of England, and it decided that according to the law of Scotland those courts have such power. The facts were these:—Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland, born and educated in that country, and having there his capital mansion, where he resided the greater part of the year, except when he held office or was attending his parliamentary duties in England, intermarried in London, in 1810, with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event she was twice there with her husband, but subsequently he resided for the most part in London, to discharge the duties of Lord of the Admiralty and Commissioner of East India Affairs, offices which he held from 1812 to 1819 inclusive. In the latter year, at the end of much domestic dissensions, a separation was determined upon, and an agreement executed by the parties; in which, after setting forth, by way of recital only, their having agreed to live separate, Sir George bound himself to allow Dame Anne Warrender a certain annuity; and it was further agreed that the agreement should only be rescinded by common consent, and in a certain specified manner. In 1834, after the parties had lived separate for fifteen years, Sir George's residence being during the latter part of the time almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another, a few months in England, generally in France, and occasionally in Italy, Sir George brought his suit in the Court of Session, (exercising under the stat. 11 Geo. 4 and 1 Will. 4, c. 69, s. 33, the consistorial jurisdiction formerly vested in the Commissaries) for divorce by reason of adultery alleged to have been committed by his wife. The basis of the whole case was, that Sir George Warrender had been domiciled [ \*758 ] resident in Scotland during the whole period, from his marriage up to the commencement of the suit, and to the time of the decision. It followed therefore that Lady Warrender became as his wife similarly domiciled in Scotland; for the principle of the law of both countries equally recognizes the domicile of the husband as that of the wife, no point of law being more clearly established. The marriage in this case, contracted in England between a man Scotch by domicile and birth, and a woman about to become Scotch by the execution of the contract, was considered not as an English marriage, and if not wholly a Scotch contract, at the least a contract partaking as much of the Scotch as the English. Lord Brougham observed, "In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman marrying in Turkey contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman and only residing in Turkey, and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, even the very nature and essence (to use the

language of the appellant's argument) must be ascertained by the English and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible tempers, that is disagreement, may dissolve the contract; as he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In like manner a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties, looking to the residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract, according to the law of that country, their home: a connection formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar [ \*759 ] reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile; the place so beautifully described by the civilian:—'*Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur.*'(o) It certainly may be well urged, both with a view to the general question of *lex loci* and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect; but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions, from supposing that the parties had a particular system of laws in their view (the only foundation of the argument for the appellant), there is fully more reason to suppose they had the law of their own home in their view, where they proposed to live, than the law of the stranger, under which they happened for the moment to be."(p) It was decided therefore in this case that the Scotch courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in England according to the law of England, when the husband's domicile is in Scotland.

3. *Scotch Courts have Jurisdiction without Reference to the Parties' Native Country, their Place of Residence, or of Marriage.*—The Courts in Scotland have been used from a remote period to pronounce sentences of divorce for adultery, without reference to the country where the marriage was contracted. Lord Brougham was of opinion that the current of judicial authority, and still more the uniform practice of the Scotch Courts, unquestioned ever since the Reformation, established clearly the proposition in its largest sense, that the Scotch Courts have jurisdiction to divorce where a normal domicile has been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may [ \*760 ]

(o) Voot. ad Pand. lib. 5, tit. 1, s. 93.

(p) 2 Clark &amp; Finn. 535—537.



have been had. (q) In *Gordon v. Englegraaf*, (r) in 1699, the marriage was contracted in Holland, between a Scotchman and a native of Amsterdam. All that was in proof was the fact of adultery committed by her in Holland, and the Scotch Court pronounced a decree of divorce at the suit of the husband. In *Graham v. Wilkinson*, (s) in 1726, the parties were married in Ireland; the husband a Scotchman; and the wife an Irishwoman. A suit for divorce, on the head of adultery, was instituted by the husband in Scotland, and a decree was pronounced. In 1731 happened the case of *Scott v. Boutcher*: (t) the marriage was had in England with an Englishwoman, and the adultery was alleged to have been committed in England. The husband, a Scotchman, instituted a suit in the Consistorial Court of Edinburgh, and, on proof of her guilt, obtained in her absence a decree of divorce *a vinculo matrimonii*. In *Urquhart v. Flucher*, (u) a Scotchman in the army married at Boston, in New England, a native of that place; they cohabited there and afterwards at Halifax, and lastly in London. The husband finding proofs of adultery committed by the wife in all those places, brought his action for divorce in Scotland, and obtained a decree accordingly. In none of these cases was the objection made that the court in Scotland had not jurisdiction, because the marriage was solemnized or the adultery committed abroad. No doubt was entertained of the jurisdiction upon proof of the adultery until the year 1789, in a case (x) in which the parties were married in England, and in which the question of domicile was the only point contested. The Consistorial Court proceeded to entertain the action, brought by the wife in the absence of [ \*761 ] the husband, who was cited edictally, but on his \*appearance, and appeal to the Court of Sessions, the action was ordered to be dismissed, on the ground that the parties were not domiciled in Scotland. In another case in 1794 there was an English marriage according to the English law and ritual; sentence of divorce *a vinculo* was nevertheless pronounced by the Scotch Courts on proof of adultery. (y)

4. *When England is both the Place of the Contract and the Permanent Domicile of the Parties at the date of the Action.*—We now proceeded to the question whether a divorce *a vinculo* should be granted, in conformity to the law of the Scottish jurisdiction, although the parties are English and have been married in England, and retain their real domicile in that country at the date of the action, upon the ground that the defender has been cited and convened in Scotland for adultery committed there; or, in other words, ought the rule of the law of England or that of the municipal law of Scotland to be adopted in such circumstances as the ground of determination? In *Duntze* or *Levett v. Levett* (z) the parties were English. The defender did not

(q) *Warrender v. Warrender*, 2 Cl. & Finn. 556.

(r) Fac. Coll. 9 June, 1699; Ferg. Rep. 251.

(s) Fac. Coll. 16 Dec. 1726; Ferg. Rep. 252.

(t) Fac. Coll. 6 Mar. 1731; Ferg. Rep. 252.

(u) Fac. Coll. 25 Jan. 1787; Ferg. Rep. 259.

(x) *Bransdon v. Dunlop*, Fac. Coll. 9 Feb. 1789; Ferg. Rep. 259.

(y) *The Duchess of Hamilton v. The Duke of Hamilton*, Fac. Coll. 7 Feb. 1784; Ferg. Rep. 260. See 2 Clark & Finn. 564—566.

(z) Ferg. Rep. 260.

enter appearance, and the commissaries appointed the pursuer (2nd Dec. 1814) to give in an articulate condescendence of the facts she averred relative to the contract of marriage betwixt the parties and the defender's domicile in Scotland. As to the first of these points of fact, she stated in her condescendence, "That the parties were regularly married on the 28th July, 1802, in the parish of St. Marylebone, in the county of Middlesex, according to the forms adopted in the church of England, &c. 2ndly, That the parties continued to cohabit together till the month of October, 1810. At that time the pursuer's husband, Mr. Levett, deserted his house at Greenwich, where he had been residing with the pursuer, and went to London, &c.; and he took up his residence in the Temple Coffee-house, and continued to live there for about fourteen months." As to the second, she alleged, that the defender, in February, 1813, came to Scotland and had continued in that country ever since. \*He resided in the [ \*762 ] town of Dunse, in Berwickshire, from the beginning of [ \*762 ] March till August, 1813. He then removed to Coldstream in the same county, where he continued till July 1814. He then removed to the city of Edinburgh, where he has since resided. From the time defender came to Scotland, he cohabited with a woman named Elizabeth Osborn, whom he described to the public as his wife, and he still continued to cohabit with her and to give her that untrue designation. Since the month of February, 1813, the defender has had no lodging or dwelling-house of any kind or description whatever, or place of business, in England, and no one circumstance indicates an intention on his part to return thither, &c. Upon consideration of this pleading *ex parte*, two of the four judges were of opinion that the action ought to be dismissed, not only because the marriage had been celebrated in England, but because the parties had their real domicile in that country, and, therefore, in every view, the law of England should be adopted as the rule of decision. The primary court afterwards, by the direction of the superior court, proceeded in the action of divorce, in the same manner as if it had been maintained between parties who were citizens of Scotland.

In *Kibblewhite or Rowland v. Rowland*, (a) which was an action of divorce, the defender made no appearance. The pursuer, in obedience to an order upon her to condescend, explicitly stated, that both of them were citizens of London, where they had been married in the year 1807, and where they had cohabited, her husband following the profession of an attorney in that city. But in the month of August, 1814, he had, according to her allegation, departed upon a jaunt to the English lakes. Afterwards he had proceeded to Edinburgh, whence he wrote to a female in London, whom the pursuer named, with directions to come to him; and this person having complied with his request, it was further asserted, that they had lived together in adultery in Scotland, till the summons was served upon him personally at the hotel in which he lodged, on the 5th October, 1814. It was only added, that the defender, so soon as he received this citation, returned to \*England. Thus there was no reason [ \*763 ] to presume that either of the parties had any connection

(a) Ferg. Rep. 226—248.

with Scotland, except the defender's visit for a period not exceeding six or seven weeks, during an autumn vacation, in the course of which time the ground for the action of divorce had been laid and communicated to his wife, so that she was enabled to convene him in the Consistorial Court of Scotland, before the approach of the term required his presence again in London. The judges of the primary court were unanimously of opinion in respect that the marriage of the parties was indissoluble by judicial sentence according to the law of England, which was both the *locus contractus* and the country in which the parties had always their real domicile; refused to sustain the conclusion of the action as laid for divorce *a vinculo matrimonii*, but in respect there is no rule of the law of Scotland which prohibits the commissaries from granting divorce *a mensa et thoro* and for separate alimony for the pursuer, on the grounds alleged in her libel, while a decree as qualified would correspond with the principles of international law, appointed the pursuer to state whether she would restrict the conclusions of her libel to that inferior remedy. The superior court remitted the case to the commissaries, with instructions to alter their interlocutor and to proceed in the divorce according to the rules of law. Proof of the husband's adultery was allowed, and the action afterwards proceeded in the common form.

In a more recent suit by the wife for a divorce, both the parties were English and had married in England, where they resided till March, 1831. The husband returned to England at the end of July, after a residence in Edinburgh of five months. In June, 1831, the wife brought her action of divorce, founded on acts of adultery committed in Scotland. The Court of the Second Division declared their unanimous opinion that the divorce was grantable, and that proof of the defendant's intention permanently to reside in Scotland was not necessary. (b)

5. *Marriage in Scotland between Irish Parties always having their real Domicile in Ireland.*—The next question \*is, whether [ \*764 ] the circumstance that Scotland has been the place of celebration will authorise the dissolution, by judicial sentence, of a marriage between Irish parties, who have always had their real domicile in Ireland.

In *Butler or Forbes v. Forbes* (c) both parties were confessedly Irish; but the marriage had been celebrated at Port Patrick in Scotland, and was of the same description in all respects with the marriage of English parties at Gretna Green, excepting that it was solemnised regularly by the clergyman of the parish. They had immediately afterwards returned to their native country, and had lived there during the whole period of their cohabitation. According to the allegations of the pursuer, the defender had afterwards come to Scotland, and had resided there without any establishment or fixed abode, from December, 1813, to the 14th March, 1814, when he was personally cited at Edinburgh, and, during this residence, had committed adultery in Scotland. On these grounds she insisted for a divorce *a vinculo matrimonii*. The defender gave no opposition to the action,

(b) *Claker v. —*, Fac. Coll. 20 Feb. 1844; 10 Shaw, D. & B. 468. (c) 7 March, 1817, Ferg. R. 209. 225.

although at an early stage of the process he made appearance, which he afterwards withdrew. The judgment of the commissaries was, that the circumstances alleged by the pursuer were insufficient, if proved, to entitle the court to hold that the defender had changed his original domicile of Ireland, where he was subject to the English law, so as at the date of this action to have acquired a real and true domicile in Scotland, his residence in which, for the period alleged, might even have been adopted for the purpose of founding this action: found, that transient or temporary residence of a foreigner, and citation within Scotland, although sufficient to convene him as a defender, and to found jurisdiction, do not, according to the principles of international law, warrant the Scotch court to apply its own law as the rule of decision in a question affecting *status*, so as to entertain a conclusion for dissolving his marriage by sentence of divorce, in opposition to the law of his proper domicile:—found, that the right of divorce is a matter of municipal regulation, and to be carefully distinguished from those qualities \*of marriage which are essential to the relation itself, as a contract *juris gentium*: [ \*765 ] —found, that all municipal regulations regarding marriage, while they cannot in any way be controlled by the will of parties, are not in their nature indelible, but may be affected by every change in the real and true domicile:—farther, found, that the alleged commission of adultery within Scotland does not warrant the court to apply its own law, with regard to conclusions of divorce against a foreigner; because, in consistorial cases, acts of adultery are founded upon by the pursuer merely for his private redress *ad civilem effectum*, and in these cases, the *locus delicti* is of no importance, although in criminal cases, where the offence is prosecuted *ad vindictam publicam*, the *locus delicti* is an essential circumstance; therefore assoilzie the defender from the conclusions of the libel and decern. The Court of Review remitted the case to the commissaries, directing them to alter their former interlocutor, to allow the pursuer to prove that the defender was domiciled and resident in Scotland when the action was raised. A divorce was ultimately decreed.

A husband, who had deserted his wife in England, and without her knowledge went to Scotland, and after being forty days there, raised an action of divorce against her; and gave her no other notice than the usual edictal citation, and both parties were natives of Ireland, and never in Scotland except for a single day, when they were married; it was held that a decree was ineffectual.(d)

The case of English parties going to Scotland for the sole purpose of being married, and immediately thereafter returning to England, has been regarded as really and truly the same with a proper English marriage; the only point of difference, viz. the marriage actually taking place in Scotland, being, indeed, an additional circumstance in favour of the Scotch jurisdiction. The jurisdiction of the commissaries was sustained in a process of divorce for adultery, the summons having been executed against the defender personally when resident with his regiment quartered in Scotland, although the mar-

(d) *Blake v. Blake*, 4 Shaw & Dunl. 795.

[ \*766 ] riage had been irregularly celebrated at Gretna Green, \*the parties were English, and had lived together only in England, and the crime was committed there.(e)

6. *With respect to the residence necessary to give the Scotch courts Jurisdiction.*—Even where both the parties to the English marriage are themselves natives of England, and have no view whatever to change either their domicile or the law under which they married, yet still the Scotch courts are competent to dissolve such a marriage, and they will accordingly sustain process of divorce to that effect, provided merely that such a domicile has been acquired in Scotland by the defender as would be sufficient to found ordinary civil jurisdiction, viz. by simple residence for forty days.(f) In *Utterton or Tewsh v. Tewsh*(g) the defender was cited in Scotland by a personal service of a summons, in which the pursuer stated that the parties had been married in England in 1790, and had cohabited there till the beginning of 1806, but alleged that he had then deserted her society, and had afterwards lived in adultery with different women both in England and Scotland. The husband submitted the question of jurisdiction to the court, and the pursuer was directed to state the grounds on which the suit could be maintained. In her answer the pursuer stated that the defender was resident in Scotland for more than forty days before the action was raised—that several of the acts of adultery charged in the libel were committed in Scotland—and that he was personally cited there—had appeared and put in defence. The judgment of the court was in respect the pursuer and defender are English, and never cohabited as husband and wife in Scotland, and that there are no sufficient circumstances stated to prove or render it presumable that the defender has taken up a fixed and permanent residence in Scotland, found that the court has no jurisdiction, and dismissed the action. This interlocutor having been brought under the review of the superior court was reversed, and the cause remitted to the commissaries with directions to sustain their jurisdiction, and the allegations of the pursuer having been satisfactorily \*established, decree of divorce *a vinculo matrimonii* was given in the common form.

An action is competent before the court of session for dissolving a marriage contracted in England by English parties, on the ground of adultery committed in Scotland, where the parties have resided upwards of forty days before the action is instituted, and where the defender was personally cited.(h) The same seems to have been decided where the defender without even acquiring a domicile had merely prorogated the jurisdiction of the commissaries.(i)

Lord Brougham observed,(k) “That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England ever since the intercourse of the two

(e) *Wyche v. Blount*, Dict. Forum competentis, App. No. 2, p. 2; *Ferg. R.* 291; *Forbes*, 1 June, 1816, Fac. Coll.

(f) See *Ferg.* 469.

(g) *Ferg. Rep.* 23.

(h) *Idaker or Goldney v. Her Husband*, Coll. 278; *Edmonstone v. Lockhart*,

*Ferg. Rep.* 168; *Duntze v. Levett*, ib. 68; *Butler v. Forbes*, ib. 209; *Gordon v. Pye*, ib. 357; and *Sugden v. Lolley*, ib. 269.

(i) *Murray v. Lindley*, Dict. Forum competentis, App. No. 5, p. 11.

(k) *Warrander v. Warrander*, 2, *Clark & Fynn*, 552, 553.

countries became constant by the union, first of the crowns and then of the kingdoms, is a fact of much importance, and it is not disputed. The importance of it is this—that the courts administering the law of divorce have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the pursuers and defenders had acquired a domicile in Scotland, and then exercised the jurisdiction without scruple and without any hesitation.”

It seems to have been the course of decision in Scotland up to the present time to consider that the Scotch courts have a right to entertain jurisdiction with respect to marriages had in England after the parties had been resident for a certain period in Scotland, though that period had been infinitely too short to constitute what can be called a legal domicile, and that these courts have preceded in such cases to divorce *a vinculo*. At one time the Commissary Court in Scotland was much inclined in such cases to modify that remedy by substituting for the divorce *a vinculo* separation *a mensa et thoro*, but the Court of Session, the court of appeal, overruled the decisions of the Commissary Court, refusing the divorce *a vinculo*, and [ \*768 ] directed that court to proceed in the accustomed and ordinary way. None of these cases however, it is believed, have received the sanction of the house of lords.<sup>(l)</sup> The proceeding for a divorce in England is a bar to a similar proceeding at the same time in the courts of Scotland.

A marriage was contracted in England between parties who were English by birth and domicile, the husband afterwards went to Scotland, and having resided there for upwards of forty days, raised an action of divorce, alleging his wife to have committed acts of adultery in England; the action was executed against the defender both at the pursuer's residence in Scotland and also edictally; no appearance was made for her; during the proceedings, the pursuer obtained a decree in the Consistory Court of England, “divorcing and separating the parties from bed, board, and mutual cohabitation; it was held that it was not competent to the husband to proceed with the action in the Scotch court. The date of the commencement of the proceedings in England was not stated. It was said that if it was prior to the institution of the suit in Scotland, it was *lis alibi pendens*, and should have prevented the action from being entertained. But however that might be, the judges were of opinion, that the decree obtained in England, before any sentence had been pronounced in the courts of Scotland, excluded the pursuer from all right to insist in those courts; and in fact left him no further ground of action, in respect of the alleged adultery of the defender. For the pursuer having already obtained all the reparation afforded by the law of his own country, could not afterwards insist for any additional reparation from the law of another country, though he might have qualified himself by forty days' residence to sue in its courts.<sup>(p)</sup>

In *Pierie v. Lunan*,<sup>(m)</sup> at the date of the action, and many years before, the parties had their only domicile in London, where they

(l) *Conway v. Bosley*, 3 Hagg. Eccl. B. & M. 2d ser. 1025—1030, cited 2 Y. Rep. 646. 312.

(p) *Allison v. Cadley or Allison*, 1 Dunl. (m) 8 Mar. 1796, Ferg. Rep. 260.

permanently resided, but both were natives of Scotland and had married there, and cohabited there for a considerable time previous to their settlement in London, afterwards following the trade of a book-binder, and cohabiting with his wife for a number of years. Lunan formed a connection with another woman, and pretending that he was a single person, had the ceremony of marriage performed with the woman in the parish of St. Luke, Chelsea, and afterwards cohabited with her. On these grounds the pursuer sued the defender before the commissaries of Edinburgh for a divorce, and her summons being served edictally against him as forth of the kingdom, an application was made by petition for a commission to take the party's oath of calumny in London. The action was dismissed as incompetent, because the domicile of both parties was in London, and the fact founded on the libel, as inferring the defender's guilt of adultery, was stated to have happened there. On appeal, the cause was remitted, with instructions to sustain the action, and proceed in the cause; accordingly the pursuer's oath of calumny and afterwards a proof were taken at London upon two several commissions, and the guilt of the defender being fully established, decree of divorce was pronounced in the common form.

In *French v. Pilcher*(n) the pursuer was a native of Scotland, and resident there at the date of the action. The defender was an Englishwoman, who had eloped with him, and whom he had married at Gretna Green. Afterwards they had cohabited together as husband and wife in Scotland and at the stations of his regiment in England and in India. But the defender, having fallen into bad health when abroad, left her husband upon duty in India, and returned to Britain, where she was guilty of adultery, while in Scotland on a

\*769 } visit \*to his relations, and afterwards at her residence in London. She was personally served with a copy of the summons at her house in London; but she got no regular citation, and made no appearance. The action was dismissed, because the defender was not cited within Scotland, nor in any shape amenable to the courts of that country. In a bill of advocacy the pursuer pleaded, that Scotland was the place of the contract and also of his domicile, and consequently by construction of law was his wife's domicile. The cause was remitted to the commissaries with instructions to sustain their jurisdiction. It was observed that *Lunan's case* was decisive of this, which is even more favourable for the pursuer from his domicile being in Scotland, from which that of his wife cannot be separated.

An action of divorce in absence and proceeding on an edictal citation was sustained at the instance of the wife against her husband, who, as alleged by her, had deserted her several years before, and gone abroad without informing her of his place of residence, both parties being natives of, and having been domiciled in, Scotland, where the marriage had been contracted, and the acts of adultery committed, on which the action was founded.(o)

(n) 13 June, 1800, Ferg. R. 262.

(o) *Buchanan or Downie v. Downie*, 16 Dunl. B. & M. 82; see *Wylie v. Laye*, 12

Dunl. B. & M. 927, in which it was held that the defender was not a Scotchman but an Englishman.

A Scotchman domiciled in Scotland was married in England to an Englishwoman, and by marriage contract secured to her a jointure on his Scotch estates; they went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery alleged to have been committed abroad after the separation. It was held by the house of lords, affirming the interlocutor of the Court of Session,<sup>(p)</sup> \*that the wife's legal domicile was in Scotland, where the husband was, and [ \*770 ] that she was amenable to the jurisdiction of the Scotch court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation.<sup>(q)</sup> Two parties, English by birth and domicile, contracted marriage in England; the husband, some years afterwards, went alone to Scotland, and after a residence of forty days, raised an action of divorce against his wife for adultery, alleged to have been committed in France and Belgium; the action was duly intimated to the wife, who lodged defences on the merits, without objecting to the jurisdiction, and closed a record, and had appearance made for her, and attended on all the diets of proof: it was held that the defender was not amenable to the jurisdiction of the courts of Scotland, and that the plea of prorogation of the jurisdiction could not, in such an action, be sustained.

In this case the husband went to Scotland on a visit for forty days, for the purpose of establishing that occasional and temporary domicile which results from a residence of forty days. Having created that species of domicile as to himself, he maintained that it must thereby equally be created as to his wife, and that she must be as amenable to an action of divorce in the Scotch courts, at his instance, as he would have been to an action at her instance.

Although such residence rendered the husband amenable as a *defender* to any action against him in the Scotch courts, it conferred on him no right to resort to those courts as pursuer. It was only to constitute a domicile against his wife, that he betook himself to that temporary domicile, to get the benefit of the legal maxim, that the domicile of the husband is the domicile of the wife.<sup>(r)</sup> It was held to be a sufficient defence by the wife, that as she had all along been answerable in the English courts, in respect that the pursuer's true domicile had all along been in England, she was not at the same time liable to answer in the courts of Scotland merely because the pursuer acquired a temporary and fictitious domicile there, the fiction of law, that the domicile of the husband is also the domicile of the wife, holding good in reference to the *proper domicile* of the husband, but not to his *fictitious* domicile.

Lord Justice Clerk and Lord Meadowbank differed from the major-

(p) See 12 Shaw & D. 847.

154.

(q) *Warrender v. Warrender*, 2 Clark & Finn. 488; 2 Shaw & Macl. 154; 3 *Id.*

(r) See *Ante*, pp. 758. 771.



rity of the judges, and were of opinion that the Scotch court had jurisdiction against the wife.(q)

7. *Cases where the Forum originis was held insufficient to found Jurisdiction.*—It has been decided that where the marriage has been contracted in England between parties who, though natives of Scotland, were at the time substantially settled and domiciled in England, and had since uniformly resided abroad without returning to Scotland, the courts of Scotland will not entertain the action of divorce. Thus where the husband, a native of Scotland, left that country when thirty years old, without any intention of returning. Having gone to England he paid his addresses to Mrs. B., who was also a native of Scotland, but had for many years resided in England. They were married in London according to the rites of the English church. Soon after, they went to France, from whence the lady returned to England, and then commenced, in the Commissary Court of Edinburgh, a process of divorce on the head of adultery. The criminal acts were said to have been committed in France. The husband, as being out of Scotland, had been cited edictally, that is, by proclamation at the market cross of Edinburgh, and at the pier and shore of Leith,(r) the commissaries proceeded in the usual way to allow a proof. But a bill of advocacy to the Court of Session was preferred in which it was pleaded that jurisdiction and the power of putting the sentence of the judge in execution, are counterparts of each other; without the latter, the former would be nugatory and absurd.

[ \*771 ] In order to constitute a *forum*, therefore, either the defendant, or where the question is purely of a pecuniary nature, some part of his effects must be subject to the orders of the court. The case was decided on general principles, the majority of the court being of opinion that there was a *forum ratione originis*, so as to found a jurisdiction in the commissaries, but that it was not competent to them, in the circumstances of the case, to pronounce a judgment of divorce between the parties, and ultimately the action was dismissed.(s)

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Mrs. Lolley, whose maiden name was Sugden, raised an action of divorce against her husband in the Consistorial Court of Scotland. She stated in her summons that in the year 1800 she was married to the defender at Liverpool, where they afterwards cohabited for some time as man and wife. She afterwards accompanied him to Carlisle, and thence to Edinburgh, where he alleged that he had business. They lived together there in lodgings for some short time. She then charged the defender with having been guilty of adultery both in England and Scotland, and concluded for a divorce in the usual form. The defender appeared and admitted the marriage and cohabitation at Liverpool, &c., but denied the adultery. The Commissaries, in respect that the parties appeared to be English, and the marriage an English contract, appointed the pursuer to state in a condescendence the grounds in law and fact on which the court was competent to entertain the action. A condescendence and answers were accordingly given in, and various acts of adultery by the defender were proved. The Commissaries suspecting collusion, examined both parties judicially, but finding no proof thereof, decreed for a divorce.(c) Lolley was afterwards tried \*at the Lancashire summer [ \*775 ] assizes 1812, for having married Ann Hunter at Liver- pool, his former wife Ann Sugden being then living. The marriages, and the fact that Ann Sugden was alive a week before the assizes were proved. The prisoner's defence was, that he had been divorced from Ann Sugden in Scotland, and that his present wife knew the fact. The decree of divorce was produced.(d) The prisoner was found guilty, but sentence was respite to their next assizes. The case was afterwards argued before all the judges at Serjeant's Inn Hall, and the conviction was affirmed.(e) This decision was much canvassed in the house of lords in *Warrender v. Warrender*;(f) there are, however, some strong features of distinction between the two cases. In *Lolley's case* the parties were not only married, but really domiciled in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas in *Warrender v. Warrender* the domicile of the parties was Scotch, and the proceeding was bona fide taken by the husband in the courts of his own country, to which he was amenable and ought to have free access; and no fraud upon the law of any other country was practised by the suit. It must be added that, in *Lolley's case*, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland, whereas the marriage in *Warrender v. Warrender* was had by a Scotchman and a woman whom the contract made Scotch, and therefore might be held to have contemplated an execution and effects in Scotland.(g) Lord

(c) *Sugden v. Lolley*, 20 March, 1812, Fac. Coll.

(d) The stat. 1 Jac. 1, c. 11, s. 3, exempts from the punishment of bigamy any person who at the time of the subsequent marriage should be divorced by any sentence in the Ecclesiastical Court. The words of the stat-

ute (9 Geo. 4, c. 31, s. 22,) now in force against bigamy are different. See ante, pp. 224, 225.

(e) See Russ. & Ryan's C. C., 237; 2 Clark & Finn. 567; Ferg. R. 269.

(f) Ante, p. 757.

(g) 2 Clark & Finn. 541.



Brougham said, that although the support of his opinion did not require that he should dispute the law in *Lolley's case*, he should not be dealing fairly with the important question, if he were to avoid touching upon that subject; and as no decision of the House of Lords had ever adopted that rule, or assumed its soundness for sound or acted upon it, he was entitled to express the contrary which he felt according to that doctrine.—a difficulty which must necessitate and frequent discussion with the greatest lawyers both of this and the last age, had not been able to remove from his mind. His lordship then stated his reasons at length.<sup>(h)</sup> His lordship afterwards added, that the judgment in the case of *Warrender v. Warrender* did not break in on *Lolley's case*, such decision being made with reference to the law of Scotland, whereas *Lolley's case* referred to the law of England, and that whatever opinion he might have entertained of *Lolley's case* in the Court of Chancery, or privately, could not affect his judicial opinion in the house of lords, sitting as a member of a Court of Appeal on a case from Scotland. Lord Lyndhurst said, “that if he conceived that the judgment about to be adopted in that case could be understood as affecting that delivered by the twelve judges in *Lolley's case*, he should have felt it his duty to object to so dangerous and precipitate a course—a course so likely to create inconvenience and embarrassment in its results—and should have recommended the house of lords, before they pronounced final judgment, to request the assistance and opinions of the learned judges of the courts of law on the whole case, or so far at least as their lordships’ judgment might be in conflict with their unanimous decision in the case of *Lolley*. The proceeding in *Lolley's case* was not carried through lightly and unadvisedly; for it came before the assembled judges of England, in the course of objections raised in reference to *Lolley's* plea of impunity, founded on the fact of the Scottish divorce, and supported by advocates of the first ability; yet the sentence, overthrowing the force of the Scottish ceremonial of divorce, was confirmed by the unanimous approbation of the twelve eminent individuals in England best fitted by talent, legal knowledge and great experience, to pronounce with the voice of undoubted authority on the wisdom of that decision. If, therefore, your lordships contemplate any interference with that sentence, so supported, it would only be just and wise to take care that such interference is warranted, and as a consistent preliminary to consult those twelve individuals, and to obtain their assistance on this important point.”<sup>(k)</sup> Dr. Lushington said, “he must consider whether in *Lolley's case* it was the intention of the twelve judges to decide a principle of universal operation absolutely and without reference to circumstances, or whether they must not be presumed to have confined themselves to the particular circumstances that were then under their consideration. *Lolley's case* is very briefly reported; none of the authorities cited on the one or on the other are referred to, nor are the opinions of the twelve judges given at any length; all that we have is the decision.

<sup>(h)</sup> 11 Mod. & Finn. p. 541—551.  
<sup>(i)</sup> 11 Mod. & Finn. p. 559.

<sup>(k)</sup> *Warrender v. Warrender*, 2 Clark & Finn. 558, 559.

It is much to be regretted that some more extended report of the very learned arguments which I well remember were urged upon that occasion, and the multitude of authorities quoted, have not been communicated to the profession and the public."<sup>(l)</sup>

After the decision in *Lolley's case* had been communicated, the Scotch court ordered the cases of Newte and Russell Manners, then in dependence before it, to be fully argued, and the English rule of law, as to the indissolubility of marriage, which was the *lex loci contractus*, was very ably urged. The judgment was, that according to the settled principles of the common law and statute law of Scotland, if there be no collusion between the parties, or other valid exception against the pursuer's right of action, adultery committed in Scotland is a legal ground for divorce, without distinction as to the country where, or the form in which, the marriage was celebrated. And accordingly a decree of divorce was pronounced in the case of Russell Manners, and in subsequent cases.<sup>(m)</sup>

*Subsequent Cases, recognizing the Doctrine in Lolley's Case.*—In *McCarthy v. De Caiz*,<sup>(n)</sup> a person of the name of Tuite contracted a marriage in this country with an \*Englishwoman; the marriage being solemnized in England, but he being him- [ \*778 ] self a Dane by birth, fortune and domicile. He afterwards removed his wife from this country, the *locus contractus*, (with which he appears to have had no further connection,) to the dominions of the king of Denmark, where his subsequent domicile continued to be; and in that kingdom the marriage was dissolved by a valid Danish divorce, as far as such a divorce could dissolve it. It was decided by Lord Brougham, C. upon the authority of *Lolley's case*, that no proceedings in a foreign court could operate to dissolve or affect a marriage celebrated in England. In *Conway v. Beazley*,<sup>(o)</sup> distinguished by the circumstance of the second marriage having taken place in Scotland, the husband was married to Miss R. on the 20th May, 1810, at Kensington, Middlesex. On the 29th August, 1823, they were divorced by sentence of the Commissary court at Edinburgh; and in 1824 the husband contracted a second marriage at Edinburgh with Emily Conway the other party in the cause. The first wife did not die till 1830, and the second wife prayed to have her marriage annulled, on the ground that when that marriage was solemnized the husband had a wife alive. It appeared that the first wife was the daughter of a person residing in Westminster, where she had resided from her childhood, and that at the time of her marriage with Beazley, and during their subsequent cohabitation, they were respectively domiciled in England; that from their separation Beazley continued to reside in England till the beginning of 1823, when he went to Scotland on business as an architect, meaning to return to England as soon as it was concluded; that in April, 1823, when Mrs. Beazley instituted proceedings in Scotland against her husband, she was not residing, nor had ever resided, in Scotland, but was living in London. In this case the authorities principally relied upon for establishing the

<sup>(l)</sup> *Conway v. Beazley*, 3 Hagg. Eccl. 89; 2 Clark & Finn. 488; 2 Slaw. & M. L. 643, 644. 154.

<sup>(m)</sup> Ferg. R. 296; ante, 757—765.

<sup>(n)</sup> 2 Russ. & M. 614; see 9 Bli. N. S.

<sup>(o)</sup> 3 Hagg. Eccl. Rep. 630.

permanently resided, but both were natives of Scotland and had married there, and cohabited there for a considerable time previous to their settlement in London, afterwards following the trade of a book-binder, and cohabiting with his wife for a number of years. Lunan formed a connection with another woman, and pretending that he was a single person, had the ceremony of marriage performed with the woman in the parish of St. Luke, Chelsea, and afterwards cohabited with her. On these grounds the pursuer sued the defender before the commissaries of Edinburgh for a divorce, and her summons being served edictally against him as forth of the kingdom, an application was made by petition for a commission to take the party's oath of calumny in London. The action was dismissed as incompetent, because the domicile of both parties was in London, and the fact founded on the libel, as inferring the defender's guilt of adultery, was stated to have happened there. On appeal, the cause was remitted, with instructions to sustain the action, and proceed in the cause; accordingly the pursuer's oath of calumny and afterwards a proof were taken at London upon two several commissions, and the guilt of the defender being fully established, decree of divorce was pronounced in the common form.

In *French v. Pilcher*(*n*) the pursuer was a native of Scotland, and resident there at the date of the action. The defender was an Englishwoman, who had eloped with him, and whom he had married at Gretna Green. Afterwards they had cohabited together as husband and wife in Scotland and at the stations of his regiment in England and in India. But the defender, having fallen into bad health when abroad, left her husband upon duty in India, and returned to Britain, where she was guilty of adultery, while in Scotland on a

\*769 ] visit to his relations, and afterwards at her residence in London. She was personally served with a copy of the summons at her house in London; but she got no regular citation, and made no appearance. The action was dismissed, because the defender was not cited within Scotland, nor in any shape amenable to the courts of that country. In a bill of advocacy the pursuer pleaded, that Scotland was the place of the contract and also of his domicile, and consequently by construction of law was his wife's domicile. The cause was remitted to the commissaries with instructions to sustain their jurisdiction. It was observed that *Lunan's case* was decisive of this, which is even more favourable for the pursuer from his domicile being in Scotland, from which that of his wife cannot be separated.

An action of divorce in absence and proceeding on an edictal citation was sustained at the instance of the wife against her husband, who, as alleged by her, had deserted her several years before, and gone abroad without informing her of his place of residence, both parties being natives of, and having been domiciled in, Scotland, where the marriage had been contracted, and the acts of adultery committed, on which the action was founded.(*o*)

(*n*) 13 June, 1800, Ferg. R. 262.

(*o*) *Buchanan or Downie v. Downie*, 16  
nl. B. & M. 82; see *Wylie v. Lyle*, 12

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that the defender was not a Scotchman but  
an Englishman.

A Scotchman domiciled in Scotland was married in England to an Englishwoman, and by marriage contract secured to her a jointure on his Scotch estates; they went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery alleged to have been committed abroad after the separation. It was held by the house of lords, affirming the interlocutor of the Court of Session,<sup>(p)</sup> \*that the wife's legal domicile was in Scotland, where the husband was, and [ \*770 ] that she was amenable to the jurisdiction of the Scotch court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation.<sup>(q)</sup> Two parties, English by birth and domicile, contracted marriage in England; the husband, some years afterwards, went alone to Scotland, and after a residence of forty days, raised an action of divorce against his wife for adultery, alleged to have been committed in France and Belgium; the action was duly intimated to the wife, who lodged defences on the merits, without objecting to the jurisdiction, and closed a record, and had appearance made for her, and attended on all the diets of proof: it was held that the defender was not amenable to the jurisdiction of the courts of Scotland, and that the plea of prorogation of the jurisdiction could not, in such an action, be sustained.

In this case the husband went to Scotland on a visit for forty days, for the purpose of establishing that occasional and temporary domicile which results from a residence of forty days. Having created that species of domicile as to himself, he maintained that it must thereby equally be created as to his wife, and that she must be as amenable to an action of divorce in the Scotch courts, at his instance, as he would have been to an action at her instance.

Although such residence rendered the husband amenable as a *defender* to any action against him in the Scotch courts, it conferred on him no right to resort to those courts as pursuer. It was only to constitute a domicile against his wife, that he betook himself to that temporary domicile, to get the benefit of the legal maxim, that the domicile of the husband is the domicile of the wife.<sup>(r)</sup> It was held to be a sufficient defence by the wife, that as she had all along been answerable in the English courts, in respect that the pursuer's true domicile had all along been in England, she was not at the same time liable to answer in the courts of Scotland merely because the pursuer acquired a temporary and fictitious domicile there, the fiction of law, that the domicile of the husband is also the domicile of the wife, holding good in reference to the *proper domicile* of the husband, but not to his *fictitious* domicile.

Lord Justice Clerk and Lord Meadowbank differed from the major-

(p) See 12 Shaw & D. 847.

154.

(q) *Warrender v. Warrender*, 2 Clark & Fin. 488; 2 Shaw & MacL. 154; 3 Id.

(r) See Ante, pp. 758. 771.

rity of the judges, and were of opinion that the Scotch court had jurisdiction against the wife.(q)

7. *Cases where the Forum originis was held insufficient to found Jurisdiction.*—It has been decided that where the marriage has been contracted in England between parties who, though natives of Scotland, were at the time substantially settled and domiciled in England, and had since uniformly resided abroad without returning to Scotland, the courts of Scotland will not entertain the action of divorce. Thus where the husband, a native of Scotland, left that country when thirty years old, without any intention of returning. Having gone to England he paid his addresses to Mrs. B., who was also a native of Scotland, but had for many years resided in England. They were married in London according to the rites of the English church. Soon after, they went to France, from whence the lady returned to England, and then commenced, in the Commissary Court of Edinburgh, a process of divorce on the head of adultery. The criminal acts were said to have been committed in France. The husband, as being out of Scotland, had been cited edictally, that is, by proclamation at the market cross of Edinburgh, and at the pier and shore of Leith,(r) the commissaries proceeded in the usual way to allow a proof. But a bill of advocacy to the Court of Session was preferred in which it was pleaded that jurisdiction and the power of putting the sentence of the judge in execution, are counterparts of each other; without the latter, the former would be nugatory and absurd.

[ \*771 ] In order to constitute a *forum*, therefore, either the defendant, or where the question is purely of a pecuniary nature, some part of his effects must be subject to the orders of the court. The case was decided on general principles, the majority of the court being of opinion that there was a *forum ratione originis*, so as to found a jurisdiction in the commissaries, but that it was not competent to them, in the circumstances of the case, to pronounce a judgment of divorce between the parties, and ultimately the action was dismissed.(s)

A process of divorce in Scotland was found incompetent against a person who was born and educated in Scotland, but had married an Englishwoman in England, but had never been in Scotland since his first appointment in the navy.(t) The jurisdiction was not sustained in these cases, because the defenders had no domicile whatever in Scotland at the dates of the actions, and had been cited edictally upon no other ground except that they were alleged to be amenable *ratione originis*, which was found insufficient.(u) It was held that a

(q) *Ringer v. Churchill or Ringer*, 2 Dunl. B. & M. 2d ser. 307—328.

(r) By the Scotch Judicature Act, 6 Geo. 4, c. 120, it is declared "that where a person, not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place of residence, and have been absent forty days without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be cited according to the forms prescribed." And by the act of Sederunt (14th Dec. 1805, s. 1), "It shall in time coming be held, that a person after forty days'

absence from his usual place of residence is forth of the kingdom of Scotland; and the citation, after that period, must be at the market cross of Edinburgh and pier and shore of Leith, &c."

(s) *Brunsdone v. Dunlop*, Mor. Dic. 4784; 9 Feb. 1789, Fac. Coll.; Ferg. Rep. 259. See Lord Brougham's Observations, 2 Clark & Finn. 553.

(t) *Morcombe v. Maclelland*, Mor. Dic. Forum Compotans, App. No. 3; Ferg. Rep. 41. 291.

(u) See Ferg. Rep. 149.

decree of divorce was ineffectual, which had been obtained by a husband who had deserted his wife, who, without her knowledge, had gone to Scotland, and after being forty days there had raised an action of divorce against her, without giving her any other notice than the usual edictal citation, and both parties being natives of Ireland, never having been in Scotland, except for a single day, when they were married, and she being resident in England.(v) The court did not think it necessary to decide the general question as to jurisdiction. It is no doubt true, that the husband's domicile is that of the wife; but in a proceeding of this nature, and where both parties have formerly been domiciled abroad, if he come to Scotland, he is bound to let his wife know that he has done so, in order that she may be aware of his change of residence. In this case, however, no such notice was given, although the parties had been [ \*772 ] living in a state of separation \*for nearly three years, and the pursuer could not be aware of all the defender's movements. In a matter of this description an edictal citation is not sufficient. It was further requisite to give her notice personally of the process, by intimation of it to her, either by a notary public, or in such a way that she could not have pleaded ignorance. This case is altogether different from that where a party by his own acts constitutes a domicile in Scotland. If he be within the territory, he must be cited according to the form prescribed by law; and if he has gone out of it, he ought to instruct some person to attend to his interest, in case of being cited in his absence. But this lady did not constitute Scotland her domicile by her own act. This was done by her husband; and, perhaps, if he had made her aware that he was going to Scotland to raise the process of divorce, an edictal citation might have been sufficient; but it is absolutely necessary that she should have been put upon her guard that such a process was in contemplation.(x)

The Court of Session having sustained their jurisdiction against a Scotchman domiciled in England *ratione originis*, the house of lords reversed the judgment, and remitted to inquire on what other grounds, appearing on the pleadings, jurisdiction could be sustained, and having regard to a suit depending in chancery, where the summons in Scotland was raised. The question in this case was, whether a man born in Scotland, having no property there, but having left his domicile there, still continued, for the purposes of the suit, a Scotchman and an object of the jurisdiction of the courts of Scotland, merely because he was born in Scotland?(y)

8. *Decisions of English Courts opposed to those in Scotland.*—The legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject; for whilst on the one hand it has been repeatedly adjudged by the Court of Session in Scotland that an action of divorce for adultery to the effect of dissolving the conjugal relation, may be maintained in Scotland at the suit of English parties, whose marriage was contracted in Eng-

(v) *Blake v. Blake*, 4 Shaw & Dunl. 795.  
This case is said to be one of fraud, 16  
Dunl. B. & M. 84.

(x) 4 Shaw & D. 797, 798.

(y) *Grant v. Pedie*, 1 Wilm. & Sh. 716.

[ \*773 ] land and solemnized according to the rules of the English law; on the other hand, it has been decided in England, on a prosecution for bigamy, and agreeably to the unanimous opinion of all the English judges, that an Englishman, whose prior marriage had been contracted and solemnized in England, but who had afterwards been divorced by a judgment of the Scottish Consistorial Court, was nevertheless, in consequence of a subsequent marriage in England, during the life of the person from whom he had been so divorced, liable to the pains of bigamy under the stat. 1 Jac. 1, c. 11.

As the laws of England and Scotland now stand, a man who has been divorced in Scotland from his first wife and then married again, may have two wives; for having been divorced in Scotland he may again marry in that country; he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but if he only cross the border his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England; again, let him go to Scotland, and his Scottish wife may proceed in the Courts of Scotland for breach of the marriage contract entered into with her in that country. (z) The greatest embarrassment to the rights of parties must arise from this conflict, for what can be more embarrassing than that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single (if not a felon) in another; bastard here and legitimate there? The utmost inconvenience must arise to the courts; for what inconvenience can be greater than that they should have to regard a person as married for one purpose, and not for another; single and a felon if he marries a few yards to the southward; lawfully married, if the ceremony be performed a few yard to the north; a bastard when he claims land; legitimate when he sues for personal succession; widow when she demands the chattels of her husband; his concubine when she counts as dowable of his land? (a) It is obvious that many most \*important

[ \*774 ] differences may arise in cases of this description. Two Scotch persons married in England may afterwards go to reside in Scotland; again, one of the contracting parties may be English, the other Scotch; if the law of Scotland continue such as these courts have hitherto held it to be, and if the decision in *Lolley's case* be of universal application, the issue of the second marriage may be legitimate in Scotland and illegitimate in England. The son may take the real estate in Scotland and not the real estate in England; he might possibly even be a Scotch peer, and lose his English title, and with it the English estates, the only support of his Scotch peerage. It is impossible, therefore, to exaggerate the importance of these questions; and accordingly the court has been guarded against laying down any principle which might affect any other case than that before it. (b)

*Lolley's Case, with subsequent Observations of Judges thereon.*—

(x) See 2 Clark & Finn. 560.

(y) *Ibid.* 549.

(b) *Conway v. Beazley*, 3 Hagg. Eccl. Rep. 646, 647.

Mrs. Lolley, whose maiden name was Sugden, raised an action of divorce against her husband in the Consistorial Court of Scotland. She stated in her summons that in the year 1800 she was married to the defender at Liverpool, where they afterwards cohabited for some time as man and wife. She afterwards accompanied him to Carlisle, and thence to Edinburgh, where he alleged that he had business. They lived together there in lodgings for some short time. She then charged the defender with having been guilty of adultery both in England and Scotland, and concluded for a divorce in the usual form. The defender appeared and admitted the marriage and cohabitation at Liverpool, &c., but denied the adultery. The Commissaries, in respect that the parties appeared to be English, and the marriage an English contract, appointed the pursuer to state in a condescendence the grounds in law and fact on which the court was competent to entertain the action. A condescendence and answers were accordingly given in, and various acts of adultery by the defender were proved. The Commissaries suspecting collusion, examined both parties judicially, but finding no proof thereof, decreed for a divorce. (c) Lolley was afterwards tried \*at the Lancashire summer [ \*775 ] assizes 1812, for having married Ann Hunter at Liverpool, his former wife Ann Sugden being then living. The marriages, and the fact that Ann Sugden was alive a week before the assizes were proved. The prisoner's defence was, that he had been divorced from Ann Sugden in Scotland, and that his present wife knew the fact. The decree of divorce was produced. (d) The prisoner was found guilty, but sentence was respited to their next assizes. The case was afterwards argued before all the judges at Serjeant's Inn Hall, and the conviction was affirmed. (e) This decision was much canvassed in the house of lords in *Warrender v. Warrender*; (f) there are, however, some strong features of distinction between the two cases. In *Lolley's case* the parties were not only married, but really domiciled in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas in *Warrender v. Warrender* the domicile of the parties was Scotch, and the proceeding was bona fide taken by the husband in the courts of his own country, to which he was amenable and ought to have free access; and no fraud upon the law of any other country was practised by the suit. It must be added that, in *Lolley's case*, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland, whereas the marriage in *Warrender v. Warrender* was had by a Scotchman and a woman whom the contract made Scotch, and therefore might be held to have contemplated an execution and effects in Scotland. (g) Lord

(c) *Sugden v. Lolley*, 20 March, 1812, Fac. Coll.

(d) The stat. 1 Jac. 1, c. 11, s. 3, exempts from the punishment of bigamy any person who at the time of the subsequent marriage should be divorced by any sentence in the Ecclesiastical Court. The words of the stat-

ute (9 Geo. 4, c. 31, s. 22,) now in force against bigamy are different. See ante, pp. 224, 225.

(e) See Russ. & Ryan's C. C. 237; 2 Clark & Finn. 567; Ferg. R. 269.

(f) Ante, p. 757.

(g) 2 Clark & Finn. 541.



Brougham said, that although the support of his opinion did not require that he should dispute the law in *Lolley's case*, he should not be dealing fairly with the important question, if he were to avoid [ \*776 ] touching upon that \*subject; and as no decision of the house of lords had ever adopted that rule, or assumed its principle for sound, or acted upon it, he was entitled to express the difficulty which he felt in acceding to that doctrine,—a difficulty which much deliberation and frequent discussion with the greatest lawyers, both of this and the last age, had not been able to remove from his mind. His lordship then stated his reasons at length.<sup>(h)</sup> His lordship afterwards added, that the judgment in the case of *Warrender v. Warrender* did not break in on *Lolley's case*, such decision being made with reference to the law of Scotland, whereas *Lolley's case* referred to the law of England, and that whatever opinion he might have entertained of *Lolley's case* in the Court of Chancery, or privately, could not affect his judicial opinion in the house of lords, sitting as a member of a Court of Appeal on a case from Scotland.<sup>(i)</sup> Lord Lyndhurst said, “that if he conceived that the judgment about to be adopted in that case could be understood as affecting that delivered by the twelve judges in *Lolley's case*, he should have felt it his duty to object to so dangerous and precipitate a course—a course so likely to create inconvenience and embarrassment in its results—and should have recommended the house of lords, before they pronounced final judgment, to request the assistance and opinions of the learned judges of the courts of law on the whole case, or so far at least as their lordships' judgment might be in conflict with their unanimous decision in the case of *Lolley*. The proceeding in *Lolley's case* was not carried through lightly and unadvisedly; for it came before the assembled judges of England, in the course of objections raised in reference to *Lolley's* plea of impunity, founded on the fact of the Scottish divorce, and supported by advocates of the first ability; yet the sentence, overthrowing the force of the Scottish ceremonial of divorce, was confirmed by the unanimous approbation of the twelve eminent individuals in England best fitted by talent, legal knowledge and great experience, to pronounce with the voice of undoubted authority on the wisdom of that decision. If, therefore, [ \*777 ] your \*lordships contemplate any interference with that sentence, so supported, it would only be just and wise to take care that such interference is warranted, and as a consistent preliminary to consult those twelve individuals, and to obtain their assistance on this important point.”<sup>(k)</sup> Dr. Lushington said, “he must consider whether in *Lolley's case* it was the intention of the twelve judges to decide a principle of universal operation absolutely and without reference to circumstances, or whether they must not almost of necessity be presumed to have confined themselves to the particular circumstances that were then under their consideration. *Lolley's case* is very briefly reported; none of the authorities cited on the one or on the other are referred to, nor are the opinions of the learned judges given at any length; all that we have is the decision.

(h) Clark & Finn. p. 541—551.  
 (i) *Ib.* 567. See ante, p. 739.

(k) *Warrender v. Warrender*, 2 Clark & Finn. 558, 559.

It is much to be regretted that some more extended report of the very learned arguments which I well remember were urged upon that occasion, and the multitude of authorities quoted, have not been communicated to the profession and the public."<sup>(l)</sup>

After the decision in *Lolley's case* had been communicated, the Scotch court ordered the cases of Newte and Russell Manners, then in dependence before it, to be fully argued, and the English rule of law, as to the indissolubility of marriage, which was the *lex loci contractus*, was very ably urged. The judgment was, that according to the settled principles of the common law and statute law of Scotland, if there be no collusion between the parties, or other valid exception against the pursuer's right of action, adultery committed in Scotland is a legal ground for divorce, without distinction as to the country where, or the form in which, the marriage was celebrated. And accordingly a decree of divorce was pronounced in the case of Russell Manners, and in subsequent cases.<sup>(m)</sup>

*Subsequent Cases, recognizing the Doctrine in Lolley's Case.*—In *McCarthy v. De Caiz*,<sup>(n)</sup> a person of the name of Tuite contracted a marriage in this country with an \*Englishwoman; the marriage being solemnized in England, but he being him- [ \*778 ] self a Dane by birth, fortune and domicile. He afterwards removed his wife from this country, the *locus contractus*, (with which he appears to have had no further connection,) to the dominions of the king of Denmark, where his subsequent domicile continued to be; and in that kingdom the marriage was dissolved by a valid Danish divorce, as far as such a divorce could dissolve it. It was decided by Lord Brougham, C. upon the authority of *Lolley's case*, that no proceedings in a foreign court could operate to dissolve or affect a marriage celebrated in England. In *Conway v. Beazley*,<sup>(o)</sup> distinguished by the circumstance of the second marriage having taken place in Scotland, the husband was married to Miss R. on the 20th May, 1810, at Kensington, Middlesex. On the 29th August, 1823, they were divorced by sentence of the Commissary court at Edinburgh; and in 1824 the husband contracted a second marriage at Edinburgh with Emily Conway the other party in the cause. The first wife did not die till 1830, and the second wife prayed to have her marriage annulled, on the ground that when that marriage was solemnized the husband had a wife alive. It appeared that the first wife was the daughter of a person residing in Westminster, where she had resided from her childhood, and that at the time of her marriage with Beazley, and during their subsequent cohabitation, they were respectively domiciled in England; that from their separation Beazley continued to reside in England till the beginning of 1823, when he went to Scotland on business as an architect, meaning to return to England as soon as it was concluded; that in April, 1823, when Mrs. Beazley instituted proceedings in Scotland against her husband, she was not residing, nor had ever resided, in Scotland, but was living in London. In this case the authorities principally relied upon for establishing the

<sup>(l)</sup> *Conway v. Beazley*, 3 Hagg. Eccl. 89; 2 Clark & Finn. 488; 2 Slaw. & M. L. 643, 644. 154.

<sup>(m)</sup> Ferg. R. 296; ante, 757—765.

<sup>(n)</sup> 2 Russ. & M. 614; see 9 Bli. N. S.

<sup>(o)</sup> 3 Hagg. Eccl. Rep. 630.

position, that a marriage celebrated in England cannot be dissolved by the sentence of a Scotch tribunal, that the contract remains for ever indissoluble, were *Lolley's case*,<sup>(p)</sup> and *McCarthy v. De Caiz*.<sup>(q)</sup>

[ \*779 ] \*Dr. Lushington said, "only one distinction exists between this case and that of *Lolley*, viz. here, the second marriage took place in Scotland; in neither case is there any proof of collusion, in resorting to Scotland, and in neither case is there any domicile in Scotland; and as in my judgment the question of domicile might form a most important and distinguishing feature, the due effect of a Scotch domicile on the decision of these cases would demand a very careful consideration. That, however, does not arise in the present case. It has been urged, that this second marriage was to be decided solely with reference to the *lex loci contractus*; undoubtedly, questions of marriage are *prima facie* to be judged of by the law of the country where they are solemnized; but I am of opinion that before considering the second marriage, I must ascertain the capability of the parties to contract. If both the parties, being at the respective times of the first marriage and of the divorce, domiciled English subjects, were by the law of England prohibited by a personal incapacity, I must apply the rule of that law." The learned judge considered himself bound by authority; for, since it appeared that neither of the parties to the first marriage were at any time *bona fide* domiciled in Scotland, no sound distinction existed between the case and that of *Lolley*, and therefore the second marriage was pronounced null and void.<sup>(r)</sup> The learned judge added, "that his judgment must not be construed to go one step beyond the present case; nor in any manner to touch the case of a divorce *a vinculo* pronounced in Scotland between parties who, though married when domiciled in England, were at the time of such divorce *bona fide* domiciled in Scotland, still less between parties who were only on a casual visit in England at the time of their marriage, but were both then, and at the time of their divorce, *bona fide* domiciled in Scotland.<sup>(s)</sup> A case in which all the parties are domiciled in England, and resort is had to Scotland (with which neither of them have any connexion) for no other purpose than to obtain a divorce *a vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced; where prior to the cause arising on account

[ \*780 ] \*of which the divorce was sought, the parties had been *bona fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to, assume it to have been established as a universal rule that a marriage had in England cannot, under any possible circumstances, be dissolved by the decree of a foreign court.<sup>(t)</sup> Before I could give my assent to such a doctrine (not meaning to deny that it may be true,) I must have a decision, after argument, upon such a case as I will now suppose, viz. a marriage in England—the parties resorting to a foreign country, becoming actually *bona fide* domiciled in that country, and then separated by sentence of

(p) *Ante*, p. 774.

(q) *Ante*, p. 777.

(r) *Conway v. Beazley*, 3 Hag. Eccl. R.

639.

(s) *Ibid.* 653.

(t) 3 Hag. Eccl. 645.

divorce pronounced by the competent tribunal of that country. If a case of that description had occurred, and had received the decision of the twelve judges, or the other high authority to which allusion has been made, then, indeed, it might have set this important matter at rest; but I am not aware that that point has ever been distinctly raised, and I think I may say with certainty, that it never has received any express decision.(u)

The effect of a divorce for adultery in Scotland is likely to be the subject of discussion in the common law courts, in an action brought by the wife who had obtained a divorce, and her second husband, against her former husband, for the costs of the proceedings in obtaining the divorce. In this case the wife of the plaintiff was several years ago duly married to the defendant, Smythe, according to the Scotch form. They resided for some time in Dumfries, but the defendant subsequently deserted her and went to London, and formed a connexion with another woman, and his wife took proceedings against him in the Scotch courts to obtain a divorce, and which ended in a decree of the court absolving the wife from the marriage tie in consequence of adultery by the husband, declaring her free to marry again, as if she had never been married before, and ordered the defendant to pay the costs of the suit, amounting to 94*l.*, to the pursuer, the wife of the present plaintiff; and the action was brought by her present husband, in his and her name, to recover that amount. The \*main question in the case was, whether the decree [ \*781 ] of a foreign court was a sufficient foundation for an action in England. The verdict was taken for the plaintiff, subject to the opinion of the court above, on a special case to be stated.(x)

*Lord Brougham's proposed Alteration of the Law.*—With the view of settling this conflict between the laws of the two countries, on a point involving so many important interests, Lord Brougham introduced a bill in the house of lords on the 3d of September, 1835,(y) by which it was proposed to provide (sect. 2) that no divorce shall be pronounced by the court of session in Scotland to dissolve any marriage not had in Scotland, unless the husband be a Scotchman, or unless his usual place of residence be in Scotland, or unless both the husband and the wife shall have lived in Scotland for twelve calendar months next preceding the commencement of the suit to be instituted in the court of session for such divorce.

By a subsequent clause it was proposed to provide, that all marriages had, or to be had, in Scotland, and valid according to the law of Scotland, and all divorces had, or to be had, in Scotland, and valid according to the law of Scotland, shall be deemed and taken to be valid marriages and valid divorces in other parts of the united kingdom, and in all the dominions thereunto belonging to all intents and purposes whatsoever.

(u) Ibid.

(x) *Russell and Wife v. Smythe*, Liverpool assizes, 20th Aug. 1840.

(y) Hans. Parl. Deb. 3d ser. vol. xxx. p.

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1307. Lord Eldon introduced a bill on Scotch divorces, 24th June, 1831; Hans. Parl. Deb. vol. iv. p. 295.

## SECT. II.—OF LEGITIMACY.

*Presumption in favour of the Legitimacy of Children by the Law of Scotland.*—A lawful child, according to the law of Scotland is one born in wedlock or within a certain time after the dissolution of the marriage; or born of parents who at the conception were under no impediment to marry, and have since intermarried. The maxim is *pater est quem nuptiæ demonstrant*. This presumption of legitimacy from the birth of a child during marriage is so strong, that it cannot be defeated but by direct evidence that the mother's husband could [ \*782 ] not be the father of the child. Although the wife was engaged in an adulterous connection with a stranger, and lived apart from her husband, the presumption of legitimacy of the children prevails, because such facts do not infer an absolute impossibility that the mother's husband could be the father.(z)

The two principal grounds upon which this presumption may be defeated are the husband's absence from the wife and his impotency, because either of these exclude all possibility of the child being procreated by the husband. It has been adjudged by the law of Scotland that to fix bastardy on a child, the husband's absence must continue till within six lunar months of the birth.(a) Where a child was born within six months after a marriage subsisting at its birth, and an action was brought by the wife against a person not her husband, alleging that he was the father of the child, and concluding for aliment, the court appointed the husband to be called as a party, and further inquiry to be made as to his opportunities of access to his wife recently before the marriage.(b)

The law of Scotland has adopted ten months as the *ultimum tempus gestationis*, therefore a child born after the tenth month is accounted a bastard.(c) But in one case, the lapse of nine calendar months and twenty-nine days from the death of the husband of the child's mother, to the birth of the child, was held not sufficient per se to overturn the presumption of the child's legitimacy.(d)

The maxim, *Pater est quem nuptiæ demonstrant* being admitted in Scotland, it follows in all questions with regard to the status of children, that if the validity or existence of a marriage be uncertain, the legitimacy or illegitimacy of children must be equally so. Cases of disputed legitimacy are of frequent occurrence in Scotland, in consequence of the admission of irregular marriages.(e)

\*783 ] *\*Legitimation of Children by subsequent Marriage.*—There is an important distinction between the law of Scotland and that of England upon the point of legitimation by marriage, the former legitimating all the children of the parties born before

(z) Ersk. Inst. b. 1, tit. 6, s. 49; *Routledge v. Carruthers*, 19th May, 1812, Fac. Coll.; 4 Dow, 392.

(a) Ersk. Inst. b. 1, tit. 6, s. 50.

(b) *Jobson*, 8 Shaw & D. 343; 5 Shaw & D. 715.

(c) *Bankton*, b. 1, tit. 2, s. 3; Ersk. Inst. b. 1, tit. 6, s. 50; *Stairs*, Inst. b. 3, tit. 3, s.

42; *Stewart v. McKeand*, Decis. 132, Aug. 6, 1774; *Routledge v. Carruthers*, May, 19, 1812; 4 Dow, 395; ante, p. 714, 730.

(d) *Sandy v. Sandy*, 2 Shaw & D. 453. See *Innes v. Innes*, 13 Shaw, D. B. & M. 1050.

(e) See ante, pp. 91—107.

the marriage, the latter legitimating only those who were born after the marriage.(f) In *M'Adam v. Walker*,(g) the woman had cohabited with Mr. M'Adam and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired the woman to stand up and give him her hand; and she having done so, he said "This is my lawful wife and these my lawful children." On the same day, without having been alone with the woman during the interval, he put a period to his existence. The court held the children to be legitimate, on the ground that the father was not incompetent to enter into the contract of marriage.

It has been an established rule and principle of the law of Scotland for some centuries that, when a man and a woman are once lawfully married, all the children born of such parents, whether born before the public celebration or open declaration of such marriage, or after it, are equally to be esteemed their legitimate children. It is perhaps not very necessary to inquire minutely into the principles on which this rule of law has been established in Scotland, as it has also been in most of the countries of Europe.(h) It is generally stated in Scotch authorities to rest on a presumption or fiction, by which it is held that there was from the beginning of the intercourse of the parties, or at the time when the child was begotten, a consent to matrimonial union interposed, notwithstanding that the contract was not formally completed or avowed to the world till a later period; [ \*784 ] and it has been thought to be recommended by these considerations of equity and expediency, that it tends to encourage the conversion of what is at first irregular and injurious to society, into the honourable relation of lawful matrimony, and that it prevents those unseemly disorders in families, which are produced, where the elder born children of the same parents are left under the stain of bastardy, and the younger enjoy the *status* of legitimacy.(i) Whatever may be the principle of this law, it is liable to some exceptions. If at the time when the child was begotten, one or both of the parties were so situated that they could not lawfully contract marriage, the presumption is excluded, and legitimation cannot take place. The presumption may be contradicted, and the operation of the law excluded by any thing which renders it impossible that the principle of it can be applied.(k)

In order that the intermarriage of the parents may render the child legitimate, it is essential that there should have been no impedi-

(f) As to the origin of legitimation *per subsequens matrimonium*, see *Kerr v. Martin*, 2 Dunl. B. & M. 760.

(g) 1 Dow, P. C. 148.

(h) Legitimation *per subsequens matrimonium* is admitted with different modifications, not only by the law of Scotland, but in France, Spain, Portugal, Germany, and most other countries in Europe. It prevails in the Isle of Man, (*Lex Scripta of the Isle of Man*, p. 70, 75,) Guernsey and Jersey, Lower Canada, Saint Lucia, Trinidad, Demerara, Barbice, the Cape of Good Hope, Ceylon, and

the Mauritius. It is not admitted by the law of England or of her other possessions in the West Indies, and North America, or by the law of Ireland. It prevails in the states of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio, but not in the other states of America.—1 Burge on Foreign Law, 101.

(i) *Munro v. Munro*, 16 Dunlop, Bell & Murray, 30.

(k) *Ib.*

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- 12 Geo. 3, c. 11, (Royal Marriage Act), 39.  
 27 Geo. 3, c. 44, s. 8, (Limitation of Suits in Ecclesiastical Courts), 387.  
 33 Geo. 3, c. 32, (Roman Catholics), 682.  
 48 Geo. 3, c. 123, (Lords' Act), 505.  
 53 Geo. 3, c. 127, (Process for Contempt—Excommunication), 177. 494—497. 502. 504.  
 56 Geo. 3, c. 100, (Habeas Corpus), 57.  
 57 Geo. 3, c. 51, (Marriages in Newfoundland), 48.  
 58 Geo. 3, c. 84, (Marriages in India), 43.  
 59 Geo. 3, c. 35, (Actions in Scotland for breach of Promise of Marriage, &c.), 97.  
 4 Geo. 4, c. 67, (Marriage of British subjects at St. Petersburg), 147.  
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 5 Geo. 4, c. 68, (Marriages in Newfoundland), 48.  
 6 Geo. 4, c. 120, (Scotch Judicature Act), 120.  
 7 Geo. 4, c. 64, s. 12, (Trial of offence in another county), 219.  
 9 Geo. 4, c. 32, (Affirmation), 673.  
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 11 Geo. 4, & 1 Will. 4, c. 65, s. 32, (Orders of Courts of Equity for Maintenance of Infants), 695.  
 — c. 69, (Transfer of Jurisdiction in Matrimonial Causes in Scotland), 117.  
 1 Will. 4, c. 2, (Marriage of the Queen under eighteen), 38.  
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 — cc. 49. 82, (Affirmation), 673.  
 4 & 5 Will. 4, c. 28, (Celebration of Marriages in Scotland by Roman Catholic Priests), 87.

- c. 76, ss. 57. 71, (Maintenance of Children), 655, 656.  
 6 & 7 Will. 4, c. 77, (Ecclesiastical Commissioners), 538, n.  
 7 Will. 4, & 1 Vict. c. 110, (Insolvent Debtors), 505.  
 2 & 3 Vict. c. 54, (Access to and Custody of Infants), 701, 702.  
 3 & 4 Vict. c. 90, (Education of Infant Felons), 704, 705.

## STATUTES REPEALED, CITED,

- 1 Jac. 1, c. 11, (Bigamy), 224. 226, 227. 775, n. 473.

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